QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period

July 1, 1951

Through September 30, 1951

Volume No. 64

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from July 1, 1951, through September 30, 1951, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

SI GARRETT,

Attorney General.

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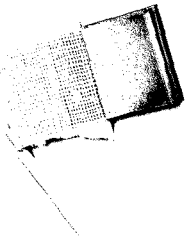
OPINIONS



July 12, 1951

Hon. W. W. Hill

Judge of Probate

Montgomery County

Court House

Montgomery, Alabama

Judges of Probate—Montgomery County—Costs and Fees—Salaries.

Where on January 24, 1935, the Judge of Probate of Montgomery County requested the Board of Revenue "not to issue a check for ex-officio services at this time." the county now has legal authority to pay him for such ex-officio services for the period of January 14, 1935, to March 3, 1939, during which period he did not draw One Hundred Dollars ($100.00) per month appropriated for "ex-officio services and other contingencies" by Act No. 80, General Acts 1931, page 152.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, dated March 30, 1951, is as follows:

"On the 24th day of January, 1935, I wrote a letter to the Board of Revenue of Montgomery County requesting them 'not to issue a check for ex-officio services at this time.' This letter was signed by me and delivered to the Board of Revenue. The record shows that from January 14, 1935 to March 3, 1939 there were no checks drawn for me, nor any payment made to me for ex-officio fees, and that on March 3, 1939 the County started paying the ex-officio fee. The foregoing is not disputed nor denied. In other words the County owes me ex-officio fees from January 14, 1935 to March 3, 1939 as shown by the records.

"You will notice there is no controversy as to whether or not the County owes this money or how much the County owes me. The matter is uncontroverted.

"I am now asking the County to pay me the amount due me, and I am asking your opinion as to whether or not the County has the authority to pay this account upon my giving proper receipt."

It is my opinion that your question should be answered in the affirmative.

Your claim against Montgomery County arises from the appropriation of One Thousand Two Hundred Dollars ($1200.00) per annum to he Judge of Probate by Act No. 80, General Acts 1931, page 152, for "ex-officio services and other contingencies." See also Act No. 218, General Acts 1927, page 219; Act No. 108, Local Acts 1939, page 65; Act No. 134, Local Acts 1943, page 68; Act No. 6. Local Acts 1945, page 4; Act No. 92, Local Acts 1947, page 64; and Act No. 472, General and Local Acts 1949, page 689, which Acts make similar appropriations.

The Judge of Probate of Montgomery County was taken off of a fee basis, and was placed on a salary basis, effective in January, 1917. See Amendment 4, Constitution of Alabama 1901. It is my information and belief that you first assumed the office of Judge of Probate in January, 1935. The One Hundred Dollars ($100.00) monthly allowance claimed for the period of January 14, 1935, to March 3, 1939, was fixed by Act No. 80, General Acts 1931, page 152, as follows: "and the further sum of Twelve hundred dollars as **ex-officio services and other contingencies** to be paid to said Judges of Probate in equal monthly installments out of the general funds of said counties." (Emphasis supplied.) Act No. 80, supra, applied only to counties having a population of seventy-five thousand people and less than one hundred thousand people, and was therefore applicable to Montgomery County. The act fixed the Judge of Probate's salary in such counties at Six Thousand Dollars ($6000.00) per annum plus said allowance of One Thousand Two Hundred Dollars ($1200.00) for "ex-officio services and other contingencies," making a total compensation of Seven Thousand Two Hundred Dollars ($7200.00) per annum.

Sixteen years have passed since you first requested the President of the Board of Revenue of Montgomery County "not to issue a check for ex-officio services at this time." I am not advised of the nature of your reason for making such request. Your reason is, however, immaterial to the present inquiry, which is whether any legal impediment exists which would bar the Board of Revenue of Montgomery County from paying to you, at the present time, the said sum of Four Thousand Nine Hundred Twenty-Nine and 97/100 Dollars ($4,929.97), if it be shown that the said amount is due and unpaid. Your request clearly was not a voluntary diminution of salary under the provisions of Title 41, Section 153, Code of Alabama 1940, and was not a waiver of your right to claim allowance at some future time. You merely requested that a check for such ex-officio services not be issued **"at this time."** (Emphasis supplied.) Any voluntary diminution of a public officer's salary must be made in the statutory manner. See Biennial Report of Attorney General, 1934-1936, page 35.

I consider first the Statute of Non-claim, as found in Title 12, Section 118, Code of Alabama 1940. The statute fixes a 12-months limitation on all claims against counties. However, a claim or fee the amount of which is fixed by law and made certain does not have to be presented to the Board of Revenue to be audited, examined and allowed, and, therefore, is not a "claim" within the contemplation of the Statute on Non-claim and is not barred by the 12-months limitation. Quarterly Report of Attorney General, Vol. 14, page 123. The salary or compensation of public county officer that is fixed as provided by law needs no presentation. **Jefferson County v. O'Gara, et al.,** 29 Ala. App. 281, 195 So. 267; Biennial Report of Attorney General, 1926-1928, page 40. Since the One Hundred Dollars ($100.00) monthly allowance was a sum certain fixed by law, it required no presentation for audit, examination, and allowance. Therefore, its payment is not barred by the 12-months limitation, nor by any other period of limitation. See Quarterly Report of Attorney General, Vol. 4, page 25; Quarterly Report of Attorney General, Vol. 14, page 123.

I consider next the nature of the appropriation for "ex-officio services and other contingencies." if the words of the statute restricted the appropriation of One Hundred Dollars ($100.00) per month solely for "contingencies," in my judgement such appropriation would create a mere contingent fund, any unexpended balance of which would revert to the county treasury. But Act No. 80, supra, does not appropriate the said One Hundred Dollars ($100.00) monthly solely for contingencies. This amount is also appropriated to compensate the Judge of Probate for "ex-officio services." Thus, the appropriation has a dual purpose. Whether the Legislature intended Ninety-nine Dollars ($99.00) to go for "ex-officio services" and One Dollar ($1.00) for "contingencies," or visa versa, I do not know. Moreover, I do not think that any

judicial tribunal could or would attempt to evaluate the amount of such services and contingencies, or either or both.

While I am not advised of what services these "ex-officio services" of the Judge of Probate of Montgomery County consist, the Legislature made an appropriation for such services and the fact of their existence, rendition, and value are not here questioned. "Ex-officio services" are defined as those which the law annexes to a particular office and requires the incumbent to perform without providing specific or precise compensation therefor. **State ex rel Fowler v. Stone, County Treasurer,** 237 Ala. 78, 185 So. 404; **Carnley, Judge v. Moore,** 218 Ala. 274, 118 So. 409.

The so-called "Sparks Amendment," which reduced public salaries to Six Thousand Dollars ($6000.00) without supplementary legislation, was proclaimed ratified on August 2, 1933, and became inoperative after October 1, 1935. See Amendment 26-A, Constitution of Alabama 1901. On January 29, 1934, the Attorney General ruled that this One Hundred ($100.00) monthly allowance for "ex-officio services and other contengencies" was not affected by the Sparks Amendment, because Act No. 80, supra, created merely a contingent fund for the expenses of running the office of the Judge of Probate. See Opinions of Attorney General, Office Edition, Vol. 16, page 342.

It is my studied judgement that the conclusion reached in that opinion is laid in error. To say that Act No. 80, supra, in making an appropriation for "ex-officio services and other contingencies" merely created a contingent fund solely for office operating expenses is, in my judgement, reading into the words of the statute a legislative intent not indicated by the statutory language. Act No. 80, supra, provides hat the said One Thousand Two Hundred Dollars ($1200.00) **"be paid the said Judge of Probate** in equal monthly installments." (Emphasis supplied.) By making the appropriation the Legislature made a finding of fact that ex-officio services were being rendered and provided compensation therefor. Clearly, the appropriation was intended, in whole or in part, to compensate the Judge of Probate for the rendition of ex-officio services. It cannot be construed as merely setting up a contingent fund of One Hundred Dollars ($100.00) per month for unforseen and unexpected office operating expenses. In any event, the statute clearly provided that the entire amount of the appropriation be paid to the Judge of Probate.

Therefore, it is my opinion that you are entitled to payment of the said Four Thousand Nine Hundred Twenty-nine and 97/100 Dollars ($4,929.97) for "ex officio services and other contingencies" for the period of January 14, 1935, to March 3, 1939, and that the Board of Revenue of Montgomery County has full legal authority to pay the said amount, provided you submit acceptable proof that the amount is due and unpaid.

Yours very truly,

SI GARRETT

Attorney General

July 19, 1951

Hon. W. G. Pruett, Director

State Highway Department

CAPITOL

Highways and Highway Department—Comptroller—Purchases and Purchase Orders.

The phrase "or other order for the payment of money" as used in Amendment XXVI, Constitution of Alabama 1901, does not include within its meaning purchase orders drawn and issued by the State Purchasing Agent for the purchase of personal property for the State.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 11, 1951, is as follows:

"Under current operation procedure the State Comptroller is encumbering purchase orders issued by the State Purchasing Department for the Highway Department against Highway funds on hand with the State treasurer; that is, the cash operating capital of the Highway Department thereby causing an impairment of this capital to the detriment of the Highway Department operations.

"The Comtroller claims by virtue of the Constitutional Amendment 26 of the Constitution of 1901 which reads in part, 'To prevent further deficits in the state treasury, it shall be unlawful from and after the adoption of this amendment for the state comptroller of the state of Alabama to draw any warrant or other order for the payment of money belonging to, or administered by, the State of Alabama upon the state treasurer unless there is in the hand of such treasurer money appropriated and available for the full payment of the same.' He construes the words 'or other order' as a purchase order. We believe this to be the wording which comes under negotiable instruments as an order upon the State Treasurer for payment of money. A purchase order is not an order for the payment of money, but for the delivery of merchandise.

"Pleases advise me as to your legal opinion to the construction of the wording 'or other order for payment of money' as contained in the Constitutional Amendment 26 of the Constitution of 1901."

In your request for opinion, you make reference to the provisions of Amendment XXVI to the Constitution of Alabama 1901, which amendment rewrote Section 213 thereof. The portion of such constitutional amendment set out by you in your request is as follows:

". . . To prevent further deficits in the state treasury, it shall be unlawful from and after the adoption of this amendment for the state comptroller of the state of Alabama to draw any warrant or other order for the payment of money belonging to, or administered by, the state of

Alabama upon the state treasurer, unless there is in the hand of such treasurer money appropriated and available for the full payment of the same. . ."

You make inquiry of me as to whether purchase orders issued by the State Purchasing Agent pursuant to requisitions submitted by the State Highway Department are included within the term "or other order for the payment of money" as used in the portion of Amendment XXVI above set out. In my opinion, they are not. In fact, I fail to see where the provisions of Amendment XXVI, supra, have any application whatsoever to the situation outlined by you in your request for opinion.

An "order," in legal parlance, has been defined as a brief note, resembling a single bill of exchange, requesting the payment of money or the delivery of personalty to the bearer of the note. **Carr v. Summerfield,** 47 W. Va. 155, 34 S. E. 804. An order is, in its principal elements, the same whether it is for payment of money or for the delivery of goods. **U. S. v. Green, 136 Fed. 618.** Here however, we are concerned with the use and meaning of the term "order for the payment of money"; hence I shall so condition my consideration of such term, and shall consider same as it finds application in the law relating to negotiable instruments. So considering same, it is found that the word "order" is employed with reference to negotiable instruments in two senses, in one sense being defined as an informal bill of exchange and in a different sense as a direction by which payee or holder of the negotiable paper prescribes to whom payment should be made. It should further be noted that it is essential to a bill of exchange that it should be drawn for money and all drafts or orders drawn for other commodities operate only as an authority to receive the contents. **Coyle's Ex'rs. v. Satterwhite's Adm'r.,** 20 Ky. 124; **Auerbach v. Pritchett,** 58 Ala. 451.

The purchase order, to which you refer in your request for opinion, is that order issued by the State Purchasing Agent to vendors for the procurement and delivery of personal property purchased by him for the State. His authority and responsibility for same is found in Title 55, Section 108, Code of Alabama 1940. Such an order is in no sense an "order for the payment of money" as such term is used in Amendment XXVI, supra. It is nothing more than an order for the delivery of certain items of merchandise specified therein, setting up an anticipated liability which later matures into a real liability upon receipt or delivery. It purports in no manner to order or direct anyone to pay to the holder thereof any amount of money. It is only upon receipt or delivery by the vendor of the items of merchandise named in such order that a warrant or other order for the payment of money" should issue to such vendor; and it is only then that the provisions of Amendment XXVI, supra, come into play, it being provided by such amendment that this latter order, i. e., an order for the payment of money, shall not issue unless there be in the hand of the state treasurer money appropriated and available for the full payment of same.

I further point out that the warrants or other orders for the payment of money referred to in Amendment XXVI, supra, are those drawn by the State Comptroller, whereas the purchase orders herein discussed are drawn by the State Purchasing Agent, the head of a separate and distinct division of the Department of Finance. This further shows the inapplicability and irrelevancy of the provisions of Amendment XXVI, supra, to the problem you have presented.

In conclusion, I advise that, in my opinion, the term "or other order for the payment of money" found in Amendment XXVI, supra, does not include

within its meaning purchase orders drawn and issued by the State Purchasing Agent.

Yours very truly,

SI GARRETT

Attorney General

July 25, 1951

Hon. W. J. Terry

State Superintendent of Education

Montgomery, Alabama

Schools—Teachers—State Board of Education—City Boards of Education—County Boards of Education.

1. A board of education legally cannot, by resolution, stipulate that school teachers holding regular Rank IV and Rank V certificates are ineligible to acquire continuing service status, and thereby deprive such teachers of the benefits of the Teacher Tenure Law.

2. To attain continuing service status, under the Teacher Tenure Law, a teacher must be regularly certificated, must serve under contract for three consecutive years in the same city or county school system, and must then be reemployed for the current school year immediately following such probationary period.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of May 28, 1951 is as follows:

"Your opinion is respectfully requested on the following points:

"1. Would a resolution by a board of education stipulating that teachers holding regular Rank IV and Rank V certificates could not attain tenure in that school system supersede Section 352, Title 52, Code of Alabama 1940?

"2. If a teacher who is not on a continuing service status is dismissed by a board of education in accordance with Section 360, Title 52, Code of Alabama 1940, how long must such a teacher remain unemployed before he would lose the years that he had accumulated on a probationary basis and thereby be forced to begin a new three-year probationary period?

"It appears that the facts in the case are:

"1. A board of education has a resulution which stipulates that teachers holding lower than Rank III certificates cannot attain tenure in that system.

"2. In order to implement this resolution, the board of education has been notifying teachers holding lower than Rank III certificates before May 1 and before they attain continuing service status that their services will not be needed for the next year.

"3. In some cases it has been necessary for the board of education to reemploy for the ensuing year certain of these teachers who had been notified that their services would not be needed.

"It appears that at least two questions should be asked about this procedure and these questions have been stated above."

1. In my opinion, your question should be answered in the negative.

Title 52, Section 351, Code of Alabama 1940, defines the term "teacher," as used in the Teacher Tenure Law of 1939, as follows:

"The term teacher as employed in this chapter is deemed to mean and include all persons **regularly certificated** by the teacher certificating authority of the State of Alabama who may beb employed as instructors, principals or supervisors in the public elementary and high schools of the State of Alabama." **(Emphasis supplied.)**

The teacher certificating authority of this state is the State Board of Education. See Title 52, Sections 322-350, Code of Alabama 1940, as amended. Teacher certification is done pursuant to rules and regulations promulgated by the State Superintendent of Education and approved by the State Board of Education. See Title 52, Section 323 and 326, Code of Alabama 1940. Such rules and regulations set forth in detail the requirements and qualifications necessary for eligibility to the various types of teaches' certificates. These types include so-called "classified certificates," which are divided into five classes or ranks, to wit, Rank I, Rank II, Rank III, Rank IV, and Rank V certificates. Their life is ten, eight, six, six, and six years, respectively. Each of these five ranks is in turn, divided into different types of classified certificates.

The various types of teachers' certificates include a second category, which consists of so-called "unclassified certificates," of which there are three types, to wit. (1) "Emergency Provisional," (2) "Non-Professional Defense," and (3) "Limited Elementary Professional." Emergency provisional Certificates and Non-Professional Defense Certificates, each of which is issued for a period of one year only, are so-called provisional certificates, "the holders of which are not "regular certificated and therefore cannot attain continuing service status. The reason why teacher holding either of these certificates is not "regularly certificated", within the meaning of the 8eacher Tenure law, is obvious. That law requires that a teacher, to attain continuing service status, must hold a regular certificate and must serve in the same city or county school system for three consecutive years and then be re-employed for the current school year immediately following such three-year probationary period. Since "Emergency Provisional" and "Non Proffessional Defense" certificates are, by their express terms, issued for a period of one year only, and are non-renewable, the holders of such certificates are automatically precluded from attaining continuing service status because of the requirement of serving three consecutive years. Quarterly Report of Attorney General, Vol. 30, page 94. While holding such certificates, they are not "regularly certificated," but are merely provisionally certificated. The third

type of unclassed certificate, to wit, "Limited Elementary Professional certificates, while not issued on a yearly basis, can and must be kept in force by the holder's completion of fifteen quarter hours of residence college work each year.

Thus, it is seen that all teachers holding any classified certificate whatever the rank, have been "regularly certificated" by the teacher certificating authority and thereunder can attain continuing service status. This same is true of teachers holding "Limited Elementary Professional" certificates, since the life of such certificate depends, not upon a twelve months expiration date, but upon the holder's yearly completion of the required work. Since the teacher Tenure Law confers its benefits upon all teachers "regularly certificated," in my opinion a board of education legally cannot by resolution or otherwise, deprive a teacher of such benefits by stipulating that teachers holding Rank IV and Rank V certificates, or either or both, shall be ineligible to attain a continuing service status. Such status must be determined by the law itself. It is a law designed for uniform administration throughout the state. Individual boards of education have not the power, by rule or regulation, to restrict its field of operation.

2. Answering your second question, is is my opinion that, in order for a teacher to attain continuing service status under the Teacher Tenure Law, the teacher must be regularly certificated, must serve for three consecutive years in the same city or county school system, and must thereafter be re-employed for the current school year immediately following such three-year probationary period. In other words, unless a teacher who has served the three-year probationary period is employed for the fourth year immediately following, the teacher thereby loses the benefit of the accumulated probationary period. This conclusion is based upon the fact that Title 52, Section 352, Subsection (b), Code of Alabama 1940, fixes the time within which the teacher's re-employment must be made. The obvious intent of the Legislature was to insure to the teacher credit for unbroken services as a teacher at the time of passage of the Teacher Tenure Law, which was approved on September 21, 1939 (See Act No. 499, General Acts 1939, page 759). Subsection (b), supra, directs that such re-employment must be for the school year beginning in the fall of 1940, or for some subsequent school year. See Quarterly Report of Attorney General, Vol. 48, page 27.

Your request indicates that one board of education has adopted the practice of terminating the services of certain teachers, who have completed the three year probationary period, at the end of such period, and that sometimes it has been necessary to re-employ such teachers for the ensuing school year. It is my opinion that the legal effect of such re-employment for the current school year immediately following completion of the teacher's probationary period is to confer upon the teacher continuing service status. In other words, the normal three-months vacation period is not a sufficient break in continuity of service to prevent the teacher from attaining continuing service status when re-employed for the fourth consecutive year.

Very truly yours,

SI GARRETT

Attorney General

July 27, 1951

Hon. Leonard Hardy, Director

Alabama State Docks and Terminals

Mobile County

Mobile, Alabama

Docks Commission—Labor—Contracts—Salaries.

In the negotiating of agreements authorized by Title 38, Section 17, Code of Alabama 1940, as to wages, seniority and working conditions, the Alabama State Docks and Terminals may consider all subjects normally considered in agreements between employers and employees.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of May 29, 1951, is as follows:

"In connection with the operation of the Terminal Railway, the Department has had agreements with the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Fireman and Enginemen since January 1, 1936, the personnel comprising said Brotherhoods being hereinafter referred to as operating railway employees. Shortly after rendition of an opinion by Hon. Albert A. Carmichael, your predecessor, dated April 6, 1950, addressed to Mr. E. S. Morgan, Director, the Department entered into contracts with the Brotherhood of Railway Clerks, Brotherhood of Maintenance of Way and Brotherhood of Railroad Carmen, hereinafter called non-operating railway employees.

"All of the aforesaid agreements contain provisions for amendment on 30 days written notice, as provided in Title 45, Section 156, USCA, which is one of the U. S. statutes in the group known as the Railway Labor Act.

"Under the date of March 15, 1949, notice to amend the existing agreement was delivered to Mr. Henry W. Sweet, then Director of the Department, by the Brotherhood of Railroad Trainmen, copy of which is hereto attached and marked Exhibit "A".

"Under date of November 1, 1949, notice of amendment was delivered to Mr. Henry W. Sweet, then Director of the Department, by the Brotherhood of Locomotive Fireman and Enginemen, copy of which is hereto attached and marked Exhibit "B".

"Pending outcome of Negotiations concerning the subjects of said notices on a national level through National Conference Committees, the aforementioned requests by the operating railway employees, were held in suspense. The history of developments in connection with negotiations by the National Conference Committees is set forth in General Order Number 2 of the Department of the Army Operation of Railroads,

dated February 8, 1951, copy of which is hereto attached and marked "Exhibit "C". It should be pointed out, however, that work stoppages referred to in General Order Number 2 occurred elsewhere than among the operating railway employees of the Department, all of the Department's personnel continuing to work regularly and without interruption.

"The Terminal Railway of the Department was not taken over by the U. S. Army and the said General Order Number 2 is therefore not directed to this Department. However, interstate railroads operating in the same territory with the Terminal Railway of the Department were affected by said General Order Number 2, and have placed General Order Number 2 in effect.

"Your attention is called to paragraphs b and c of Section II of General Order Number 2 which directs a wage increase of 12½ cents per hour effective as of October 1, 1950. The Department has placed in effect a wage increase of 12½ cents per hour for its operating railway employees of May 1, 1951, leaving a period in question from October 1, 1950 through April 30, 1951.

"In light of the foregoing circumstances, the following questions are respectfully presented for your consideration and official opinion:

"1. Does the Department of State Docks & Terminals have legal authority to make payment in full to said operating railway employees of the Terminal Railway of the total amount of said pay increase at the rate of 12½ cents per hour for the period from October 1, 1950 to April 30, 1951, both inclusive?

"2. Does the Department of State Docks & Terminals have the legal authority to make said payment in full to each of said operating railway employees from funds of the Department in view of the provisions of Section 68 of the Constitution of the State of Alabama and the provisions of Title 41, Section 152, Code of Alabama 1940?

"With respect to the non-operating railway employees, the Department received notices, each of which was dated October 25, 1950, from the Brotherhood of Railway and Steamship Clerks, Brotherhood of Maintenance of Way Employees, and Brotherhood of Railways of Carmen, which are attached hereto and respectively marked Exhibits "D" "E" and "F". The said request also went to conference on national level, and resulted in agreement, which is identical as to each Brotherhood, copy of one of which is hereto attached and market Exhibit "G".

"Your attention is directed to Article one which provides for a wage increase of 12½ cents per hour, effective February 1, 1951, and a "cost of living" "adjustment", which is set forth in Article two, this so-called "escalator clause" being effective April 1, 1951. The interstate railroads operating in the same territory with the Terminal Railway of the Department have placed in effect the same agreements.

"Important questions are presented with respect to the authority of the Department to enter into agreements containing "cost of living adjustment" provisions, as set forth in said agreement, the payment of the wage increase of 12½ cents per hour from February 1, 1951 through April 30, 1951, and payment of cost of living adjustment as translated into wages for the period from April 1, 1951 through April 30, 1951.

"Your official opinion is respectfully requested to the following questions:

"1. Does the Department of State Docks and Terminals have legal authority to make payment in full to the non-operating railway employees of the Terminal Railway of the total amount of said pay increase at the rate of 12½ cents per hour for and during the period from February 1, 1951 through April 30, 1951, both inclusive, in the light of the provisions of Section 68 of the Constitution of Alabama?

"2. Does the Director of the Department of State Docks and Terminals have legal authority to execute an agreement providing for cost of living adjustment of wages of non-operating railway employees, as set forth in Article II of Exhibit "G", and to comply therewith?

"3. Does the Department of State Docks and Terminals have authority to make payment in full to the non-operating railway employees of the Terminal Railway of the total amount of pay increase called for under said cost of living adjustment from April 1, 1951 through April 30, 1951 in the light of Section 68 of the Constitution of the State of Alabama?

"If your answers are in the affirmative to the foregoing questions relating to the operation and non-operating railroad employees, the annual compensation of a substantial number of said employees will exceed $5,700.00.

"1. In view of the provisions of Title 41, Section 152 of the Code of Alabama of 1940, does the Director have legal authority to contract for and pay a railroad employee more than $5,700.00 per year?"

In studying the facts as set forth by you, I conclude that the purpose of the letters of the Director of the Alabama State Docks and Terminals to the respective Brotherhoods dated April 12, 1949 (Exhibit "A"), and November 15, 1949 (Exhibit "B"), was to hold in abeyance negotiations on the contract changes pending settlement on a national level so that "the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with the terminal railroads authorized hereby." Title 38, Section 17, Code of Alabama 1940.

During the course of the negotiations on the national level, the President of the United States, by Executive Order No. 10155, directed the Department of the Army to take over the railroads of the country, including most of the operating in the vicinity of the Alabama State Docks and Terminals.

Pending the outcome of negotiations between the carriers and the brotherhoods on a national level, the Department of the Army did by General Order No. 2, paragraph 2-b and c (Exhibit "C"), direct a pay increase of 12½ cents per hour, effective October 1, 1950.

On May 1, 1950, the Department of the State Docks and Terminals granted a wage increase of 12½ cents per hour. Since the Department was forbidden by the Railway Labor Act (Section 156) from unilaterally changing its rates of pay in an effort to place its wage rates in conformity with the interstate railroads operating in the same territory, I assume that the change was made by means of an amendment to the existing contracts or by a new or interim agreement between the Docks and the Railroad Brotherhoods, pending the outcome of negotiations on a national level.

I can see no legal objection to such an agreement covering the period from October 1, 1951 through April 30, 1951. The Department, having been authorized to negotiate agreements by Section 17, supra, had the right to amend temporarily or permanently its existing labor contracts as of a certain date, if it should so desire and the brotherhoods should so agree. The fact that the amendment was not negotiated until May, 1951, would not affect the right of the Department to make the amendment effective as of October 1, 1950, if that was the intention of the parties. The process of negotiation began in 1949 with the notices set forth in your Exhibits "A" and "B". Under the Railway Labor Act the contracts may then be amended at any time after thirty days (U. S. C., Title 45, Section 156), but until it is amended then the existing rates of pay must be retained. The very wording of the statute contemplates that once an agreement is reached it will be "retroactive" to the beginning of negotiations, unless a different settlement is reached by the parties.

The facts outlined herein are substantially similar to those considered in an opinion of this office to the Director of the State Docks and Terminals now appearing in Quarterly Report of Attorney General, Vol. 53, page 127, which opinion is still applicable, there having been no changes in the statutory provisions therein construed. Based on the reasoning, logic, and legal authorities therein set out, in answer to question 1 of your first set of questions, I am of the opinion that the Department of State Docks and Terminals has the legal authority to make payment in full to the operating railway employees of the terminal railway of the total amount of said pay increase at the rate of 12½ cents per hour for the period from October 1, 1950, to April 30, 1951, both inclusive.

My answer to question 2 of your first set of questions is also in the affirmative. Quarterly Report of Attorney General, Vol. 53, page 127; Vol. 61, page 78.

Furthermore, it would follow that the same reasoning would be applicable to a final settlement on a national level granting "retroactive" pay increases, if the Department and the Brotherhoods in negotiating their contract should agree to accept the national decision.

Turning now to your second set of questions, I am of the opinion that when the Legislature authorized the Alabama State Docks and Terminals, in Title 38, Section 17, Code of Alabama 1940, "to make agreements as to scale of wages, seniority and working conditions" it meant to authorize consideration of any and all subjects normally considered in agreements between employers and employees. "Cost of living adjustments" or "escalator clauses," while of comparatively recent prominence, have always been considered proper subjects for contract negotiations. CCA Labor Law Reporter, Vol. 5, par. 53309 and par. 53401.

Therefore, based on the reasoning and authorities heretofore advanced, your first and third questions are answered in the affirmative. Quarterly Report of Attorney General, Vol. 53, page 127; Vol. 59, page 8.

Your second question is also answered in the affirmative.

Your final question has been answered affirmatively in Quarterly Report of Attorney General, Vol. 61, page 78.

All official opinions of the Attorney General herein cited, none of which have been withdrawn, overruled or modified by the Attorney General, or ren-

dered inapplicable by legislative action or court decision, are still in full force and effect.

Yours very truly,

SI GARRETT

Attorney General

August 3, 1951

Hon. Perry B. Hughes, Jr.,

Clerk, Circuit Court,

Tuscaloosa County,

Tuscaloosa, Alabama.

Clerks of Circuit Courts—Counties—Funds.

1. If the clerk of the circuit court of a county has "observed the highest care, vigilance, and diligence" in safeguarding money which he has collected for the State, county, or various litigants having business in the court, and the safe in his office in which such money is kept is opened and the money stolen, neither he nor his sureties are liable for the loss of the same.

2. Under the facts and circumstances stated, the clerk of the Circuit Court of Tuscaloosa County, Alabama, and the sureties on his official bond are not liable for money of the State, county, or various litigants having business in the court, which was stolen from the safe in his office on the night of August 8, 1949.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of July 25, 1951, is as follows:

"I desire an official opinion upon the facts, as follows:

"On the night of August 8, 1949, the Court House of Tuscaloosa County, Alabama, was entered by burglars and the safe in my office of the Circuit Clerk was opened. The sum of $3,789.91, in cash was stolen, which was the specific money which I had collected as Clerk of Circuit Court of Tuscaloosa County, for the State, Tuscaloosa County, and various litigants having business in the Circuit Court of Tuscaloosa County, Alabama. All of said money was stored in a safe which was provided for my office as Clerk of the Circuit Court of the County of Tuscaloosa for the storage of money, papers and other valuables. At the time of said burglary, none of the money which was stolen was then due to have been remitted and none of said money was then in the safe due to

any dereliction on my part in not having remitted. This safe had been used by my predecessors in office for many years and used for this same purpose of storing money and other valuables. On the night on which the burglary occurred, I had personally locked the safe by turning the combination. The burglary and the entry into the safe were apparently done by expert criminals of great experience. A safe expert, Mr. Frank Haram, who conducted the official examination of said safe, examined the safe immediately after the burglary and found the safe and the combination thereon defective and stated in his report, among other things concerning the defective safe, that the bar that was supposed to reach across four tumblers was broken and only reached the back of two tumblers, which defect made that combination practically no combination at all. Further, he stated that he examined the combination and the inside of the safe and stated that it was practically not any good at all. He further stated that with the two tumblers missing that the main protection was missing and that he could open the safe in half an hour without knowing the combination. Further, that when the safe was completely locked it afforded no protection. He further stated that if the safe had been in good mechanical condition at the time of the burglary that it would have been practically impossible for him or any other safe expert to open it by working the combination unless he knew the combination. This statement can be verified and without dispute it can be shown that said safe was in this defective mechanical condition at the time of the burglary. I did not know of this defective condition of the safe.

"After the examination of this safe by this safe expert and upon his statement that it was not practical to repair it, the Board of Revenue of Tuscaloosa County authorized the purchase of a new safe which was installed and is still being used.

"On October 4, 1949, Mr. Ralph P. Eagerton, Chief Examiner of Public Accounts, called upon me as Clerk of the Circuit Court of Tuscaloosa County, Alabama, to make a settlement for the shortages which resulted from the theft and that demand is still open. Therefore, I would like to propound the following questions to you for an opinion:

"1. Would the foregoing facts, ready to be verified, be due diligence on my part in the safekeeping of these funds intrusted to me?

"2. Assuming that the foregoing facts would show due diligence on my part, would I, or the sureties on my official bond as Clerk of the Circuit Court of Tuscaloosa County, Alabama, be liable to make restitution of this money?"

The answer to your inquiries calls for the application of a principle of law which has been considered in opinions of this office on several occasions to the facts set out in your request. The latest of these opinions dated June 30, 1950, and found in Quarterly Report of Attorney General, Vol. 59, page 132, reads in part as follows:

"In **State v. Houston,** 78 Ala. 576, the Supreme Court of Alabama considered the liability of a tax collector and his sureties for money belonging to the State, of which the tax collector was robbed by irresistible force, and held:

"' * * * Our conclusion is, that, * * * if, having observed the highest care, vigilance, and diligence to prevent loss, the collector is robbed of money belonging to the State by irresistable force, it constitutes a

valid defense to an action on his bond for the recovery of such money. We say **money belonging to the State,** for if it appears that the specific funds received by the collector have been used or changed for any unauthorized purpose, he becomes **eo instanti** a debtor, and he and his sureties are bound to absolute payment, as for a debt. In such case, subsequent robbery of money substituted for the amount misused, is no defense. The robbery must be of money, the property of the State. * * *'

"That case has been frequently citied, quoted from, and commented upon, but the Supreme Court of Alabama has never criticized, modified, or departed from the above holding in anyway. Consequently it may be said that it is the settled law of this State on this subject.

"In light of the above, I think it is also the law of this State that, if, having observed the highest care, vigilance, and illigence to prevent loss, a judge of probate has **money belonging to the State or county** taken from him by stealth, through a burglary of his office, it constitutes a valid defense to an action on his bond for the recovery of such money. The term 'money belonging to the State or county' means the specific money which had been collected by the judge of probate for the State or county. This office has previously held to this effect in Biennial Report of Attorney General, 1930-32, page 560, and Quarterly Report of Attorney General, Vol. 6, page 14."

It will be seen from the above statement that each such case must be considered in view of the facts in the particular case.

In answer to your first inquiry, it appears that, under the facts and circumstances set out by you (which I assume to be true, in the absence of any proof to the contrary), on the night of August 8, 1949, when the safe in your office was opened and funds which you had collected as clerk of the Circuit Court of Tuscaloosa County were stolen, you "observed the highest care, vigilance, and diligence" in safeguarding such funds; and that you were not guilty of any negligence which contributed in any way to the loss of such funds.

Applying the principal of law above set out to the facts and circumstances here under consideration, it is my conclusion that your second inqury should be answered in the negative.

Yours very truly,

SI GARRETT,

Attorney General.

August 10, 1951

Hon. H. E. Lindsey, Chairman

Marion County Board of Revenue

Hamilton, Alabama

Bonds — Constitutional Amendments — Counties — Health and Health Department — Marion County — Taxation — Warrants.

Under Act No. 115, General and Local Acts 1949, page 139, as amended by Act No. 81, General Acts, Regular Session, 1951, approved June 8, 1951, and Amendment No. LXXV, Constitution of Alabama, 1901, proclaimed ratified December 21, 1949, Marion County may issue warrants in the amount of $75,000 for purposes of constructing and equipping a Health Center at Hamilton, Alabama, and a Public Health Clinic at Hackleburg, Alabama.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of July 18, 1951, is as follows:

"The Marion County Board of Revenue has passed a resolution authorizing the construction of a clinic in the Town of Hackleburg in Marion County, Alabama, together with a County Public Health Center to be located near the Marion County Hospital at Hamilton, Alabama, on the hospital grounds. This public health center is to house the County Health Unit and its allied officers. The Board further contemplates having a few officers in addition to those which are required by the County Health Unit available in said building for rent to physicians and surgeons utilizing the hospital and hospital facilities.

"The Board also passed a resolution authorizing the issuance of $75,000 worth of warrants against the special Marion County Sales Tax, payable over a period of 20 years, for the construction of these two projects.

"The question is whether such expenditure can be legally made and the warrants issued for these purposes by the Board of Revenue, out of the Marion County Sales Tax funds, all in accordance with Act No. 115 of the Alabama Legislature of 1949, approved June 22, 1949, as amended by Act No. 81 of the 1951 Legislature of Alabama, approved June 8, 1951, and in accordance with Constitutional Amendment No.. LXXV proclaimed ratified December 21, 1949.

"We would appreciate your early opinion."

Act No. 115, General and Local Acts 1949, page 139, provides for the levy, in Marion County, of a special privilege or license tax, the proceeds of which are to be used for certain public health work. Section 7 of this Act, as amended by Act No. 81, General Acts, Regular Session, 1951, approved June 8, 1951, provides that the total revenue arising during the first twenty-four months after July 1, 1949, is earmarked for the construction of a clinic in the town of Guin, Alabama.

Section 7, as amended, supra, further provides that within twelve months from the effective date of Act No. 81, supra (June 8, 1951), the Marion County Board of Revenue must issue bonds or warrants against revenue arising from this tax, in an amount to exceed $40,000. The funds are to be used within that time to construct and equipt a public clinic within the town of Hackleburg, Alabama. The remainder of the revenue is to be used to maintain, operate, and improve the County Public Hospital at Hamilton, Alabama, and for other public health purposes deemed proper by the Marion County Boad of Revenue.

Accordingly, it is my opinion that the revenue against which the warrants are to be issued in the amount of $75,000, as mentioned in your request, must arise subsequent to July 1, 1952.

It is my further opinion that only $40,000 of this money may be spent to construct and equip a County Public Clinic at Hackleburg, Alabama. The remaining $35,000 could be used for the Public Health Center at Hamilton, Alabama. Clearly, this latter use falls within ". . . other public health purposes of any kind and description as in the judgement of said Marion County Board of Revenue is meet and proper." Act No. 81, supra.

Amendment No. LXXV, Constitution of Alabama, 1901, proclaimed ratified December 21, 1949, provides that bonds, warrants, or other evidences of indebtedness issued under said amendment may be interest bearing, with maturity date within thirty years from date of issuance. The warrants contemplated in your request are payable within twenty years, hence they are not violative of this amendment.

While I know of no provision of law which would authorize the construction by the county of a building to be leased to private individuals, I see no reason why extra rooms in the Health Center, if not presently needed for public health purposes, could not be rented to physicians serving the clinic. Quarterly Report of Attorney General, Vol. 48, page 7. It would appear that such use would enhance the utilization of the center.

Yours very truly,

SI GARRETT,

Attorney General

August 15, 1951

Hon. James V. Jordan

Secretary, Building Commission

State of Alabama

CAPITOL

Contracts — Building Commission — Damages — Public Works — State and State Departments.

1. The State Building Commission, in awarding contracts for public works, such as the livestock coliseum, may include a provision in said contracts awarding liquidated damages to the State in the event said work is not completed on time.

2. The provision in contracts for public works authorizing liquidated damages in the event of delay may commit the granting or refusing of additional time to the discretion of a board or officer.

3. When the granting or refusing of additional time for the completion of public works is vested in a board or officer, said board or officer may grant or refuse the additional time for good cause.

4. Under facts stated, the State Building Commission, through its Director of the Technical Staff, may allow additional time to contractor without violating Section 100 of the Constitution of Alabama 1901.

5. Under facts stated, the State Building Commission, acting through its Director of the Technical Staff, may refuse to grant additional time for the completion of a public work and invoke the contract provision for liquidated damages.

6. The question of the disposition, under facts stated, is a moot question until it is decided whether or not additional time will be granted to the contractor for completion of public works.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of April 19, 1951, is as follows:

"The State Building Commission (1945 Acts, page 116) has this day instructed me, as Secretary thereto, to request your official opinion upon the right of the Commission to grant an extension of time beyond the five hundred days allowed in the contract with the J. A. Jones Construction Company for the completion of the livestock coliseum, and also, in the event that no extension could be granted and a penalty was enforced and collected, what disposition would the Commission be authorized to make of the funds so collected?

"Some of the members of the Commission expressed doubt as to the extension of time for completion even though the provisions of the contract for the completion of the coliseum provide for an extension of time by the Director of the Technical Staff (copy of that portion of the contract is attached hereto).

"Your attention is further invited to the fact that during July of 1950, prior to the prescribed date of completion of the coliseum, the Jones Construction Company presented a request to the Building Commission for a ninety-day extension of time on the contract. That fact was made known officially to the Building Commission and is recorded in the minutes of the meeting thereof (copy of pertinent part is attached hereto). At that time no action was taken by the Commission other than informal authorization for the Jones Company to complete the coliseum and at that time they would determine the extension factor. (Enclosed herewith is copy of letter from the Jones Construction Company under date July 5, 1950.)

"The consideration of the questions herein propounded involves the following acts to which your attention is also respectfully invited:

Act No. 128, 1945 Acts, page 116
Act No. 282, 1945 Acts, page 447
Act No. 320, 1947 Acts, page 183
(Section 1, Item XI)
Act No. 525, 1947 Acts, page 384

"It was suggested by some of the members of the Commission that perhaps Section 100 of the Constitution of 1901 would have some bearing on the matter at hand. It was also suggested that the power to the Director of the Technical Staff to agree by contract for the Commission to retain an option or election to grant an extension of time would be without authority unless the Commission itself also had the power to extend the time. It appears in this instance that the extension of time was an alteration or modification of the contract pursuant to its terms which would not in any manner occasion serious detriment or loss to the State in view of the fact that the contract with the Jones Company, when completed, would not complete the premises and make same suitable for the purposes suitable for the purpose of operating it as a livestock coliseum and it was known at that time, as it is now, that there was insufficient funds to contract for a complete job. The contract was executed on behalf of the State by Howard H. Houk, Director of the Technical Staff and by James E. Folsom, Chairman, Governor of Alabama. The references of 'Director' and 'Chairman' is applicable to the Building Commission. (There is only one copy of the contract and specifications and it is composed of about two hundred pages and may be available from the office of the Building Commission.)

"The additional facts given you are done so upon the express direction of the Building Commission members in order that you may have full information in the premises.

"Your usual prompt and courteous attention will be appreciated."

Your inquiry refers to the fact that during July of 1950, and prior to the date for the completion of the coliseum, the Jones Construction Company requested a ninety-day extension of time on the contract. This request was made by a letter which you attach to your inquiry and which is here set out:

"J. A. JONES CONSTRUCTION COMPANY

133 Ellis St., N. E., Atlanta 3, Ga.

July 5, 1950

"State of Alabama
Building Commission
702 Washington Avenue,
Montgomery, Alabama

"Attention—Mr. H. H. Houk
Director of Technical Staff
Re: Livestock Coliseum
Montgomery, Alabama

"Gentlemen:

"We hereby request a ninety-day extension of time on the above contract. This is made necessary due to our miscalculation of the length of time required to erect the centering for the roof structure. This in turn delayed the starting of the seating sections.
"We have pushed this job hard and feel we have done everything possible to complete the project on time.

"Your consideration of this request will be appreciated.

Very truly yours,

J. A. JONES CONSTRUCTION COMPANY
W. M. Wheeler"

Your inquiry also refers to the minutes of a meeting of the Building Commission on Thursday, August 17, 1950, a copy of which was attached to your inquiry and reads as follows:

"M I N U T E S

OF THE

STATE OF ALABAMA BUILDING COMMISSION

MEETING

THURSDAY, AUGUST 17, 1950

"The Building Commission met in the State Chamber at 10:15 A. M., Thursday, August 17, 1950.

"In the absence of the Chairman, the meeting was called to order by the Vice-Chairman, Mr. Sullivan.

"The Secretary called the roll and the following were present:

MEMBERS

Dr. A. R. Meadows
Dr. D. G. Gill
Albert Boutwell
R. J. Lowe
J. A. Hughes
George P. Quarles
Joseph Sullivan
J. Fred Wood
Edward B. Miller
Ira Pruitt

Governor Folsom and Mr. McRae were absent.

TECHNICAL STAFF:

H. H. Houk
Edwin B. Lancaster

SECRETARY:

James V. Jordan

* * * *

"Mr. Blyth, Superintendent of J. A. Jones Construction Company appeared before the Commission and requested an extension of time on the completion of the Livestock Coliseum. He explained that due to labor strikes, etc. that it was impossible to complete the construction on time date set out in the contract.

"Senator Lowe moved and Dr. Meadows seconded that:

"The Commission withheld any action at the present time to alleviate the situation confronting J. A. Jones Construction Company in regard to the completion of the Livestock Coliseum until the building has been completed, and that they be requested to appear again at that time.'

"The Commission voted unanimously for the motion."

It is my opinion that the State Building Commission, as created by Act No. 128, General Acts 1945, page 116, now has power and authority to:

1. Grant an extension of time beyond the five hundred days to the contractor.

2. Refuse an extension of time and retain from the contractor liquidated damages in the amount of $100 per day as provided in the contract.

In the event that alternative No. 2 above is chosen by the Building Commission, the disposition of the liquidated damages may be made the subject of a later opinion of this office.

Your inquiry involves an interpretation of the contract entered into by the J. A. Jones Construction Company and the Building Commission of the State of Alabama, whereby the contractor promises, among other things, to furnish material and perform work and labor on the Livestock Coliseum located in Montgomery, Alabama. The contractor promises to perform the work in a certain length of time, and the State of Alabama, through its Building Commission, promises to pay a sum certain for said materials and services.

As recited in your inquiry, the contract, in respect to the time for completion, provides as follows:

"IB10. **LIQUIDATED DAMAGES:**

"Time is an essential element in the Contract as the delay in the completion of the work will deprive the public of the use of the structure for which the funds have been provided, deprive the State of the revenue therefrom, and increase the cost to the State of the administration and supervision of the Contract.

"Therefore, for each calendar day the Work remains uncompleted after the time specified in the Proposal, or additional time that may be allowed by the Director for the completion of the Work, if extra or additional is ordered by the Director, the amount of One Hundred ($100) per day shall be paid by the Contractor to the State as liquidated damages for loss sustained by the State because of failure of the Contractor to complete the work within the time specified in his Proposal."

The "Director" referred to in this part of the contract is, of course, the "Director of the Technical Staff of the State Building Commission" (Item 1AO1 c. Contract "Specifications, Section 1, General Conditions, Subsection A, Definitions, page 1.") He is an employee and agent of the Commission as authorized by Section 2 of Act No. 128, supra.

It is clear from the quoted provisions of the contract that a method was agreed between the parties by which the time for completing the work could be extended. If, during the construction period, it was anticipated that the work could not be completed within the five hundred days provided in the contract, the contractor by the terms of the above-quoted provision of the contract could apply to the "Director" (of the Technical Staff) for an extention of time. A request for an extension of time could by the terms of the contract be granted or refused by the said Director, who of course, acted at all times under the supervision and control of his principal—the Building Commission.

Your inquiry shows that a written request was made by the contractor to the Director and the Building Commission to extend his time for the completion of the contract for a period of ninety days. This request in writing, dated July 5, 1950, was again brought to the attention of the Commission at its meeting thereafter on August 17, 1950. For reasons not stated in your inquiry, the Commission withheld action on the request, and the minutes of the Commission meeting show that the contractor was advised to appear before the Commission after the completion of the coliseum.

At the meeting of the Commission on August 17, 1950, it is my opinion that the contractor was entitled to know (1) whether or not his time would

be extendeded, or (2) whether he would be incurring a penalty of one hundred dollars a day after the expiration of the five hundred days. At that time, the Commission could have considered the grounds presented to it by the contractor for an extension; and if reasonable, grant the extension; if unreasonable, refuse it and automatically invoke the penalty. The Commission withheld a decision, however, and from all the facts that appear before me, the contractor did not insist on a determination at that time, but chose to complete the structure and present his case for additional time at a later date when the building was completed.

It is my opinion that the contractor is now entitled to a determination by the Commission of the merits of his prior request for a time extension, and it is the duty of the Commission to make a decision. Both of the parties may be said to have contemplated this procedure at the time of the Commission's meeting in August 1950.

A governmental agency letting a contract may require stipulations to be included therein for liquidated damages in the event of a delay in the completion of the work, and the courts give effect to such stipulations according to their terms. **Robinson v. U. S.** 260 U. S. 486, 67 L. Ed 760, 43 S. Ct. 420.

A governmental agency having the power to let public contracts may, upon good cause being shown, grant to the contractor an extension of the time for performance, where it appears that he will be unable, through no fault of his own part, to complete the work by the time stipulated in the contract. **United States v. Gleason,** 175 U. S. 588, 44 L. Ed. 284, 20 S. Ct. 228, 43 Am. Jur., p. 811. Furthermore, the allowance or refusal of additional time may be a matter committed by the contract to the sound discretion of an officer or board of the Government. **U. S. v. Gleason, supra.**

If no additional time is granted by the Government and liquidated damages are provided for in the contract, such damages are recoverable from the contractor without proof of actual damage to the Government. See 34 A. L. R. 1345, 51 A. L. R. 1214.

I am of the opinion, therefore, that the Director of the Technical Staff, under the control and supervision of the Building Commission, may now decide whether or not there is just cause for granting the additional time requested by the contractor.

I have also considered whether the action of the Commission and its Director of the Technical Staff in granting an extension of time to the contractor would violate Section 100 of the Constitution of Alabama 1901, which provides as follows:

> "Section 100. No obligation or liability of any person, association, or corporation held or owned by this state, or by any county or other municipality thereof, shall ever be remitted, released, or postponed, or in any way diminished, by the legislature; nor shall such liability or obligation be extinguished except by payment thereof; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value, provided that this section shall not prevent the legislature from providing by general law for the compromise of doubtful claims."

It is my opinion that such action would not violate said Section 100. This section of the Constitution prohibits the extinguishing of an **obligation** or **liability** due the State except by payment. **It cannot be said at the present**

time whether or not there is an obligation or liability on the part of the contractor to the State of Alabama. The existence of an **obligation** or **liability** to the State necessarily depends upon a determination by the State of whether the additional time for performance of the work will be granted or not. If the State, through its Building Commission, decides that additional time may be granted, then there is not, and never was, an obligation or liability on the part of the contractor to pay damages. On the other hand, if the Commission determines that additional time may not be allowed, then the liability or obligation to pay damages is created at the time of such determination.

If the Building Commission decides to grant additional time to the contractor, then there will be no necessity to decide on the disposition of the penalty. If however, the Commission decides to refuse additional time and to invoke the penalty, this office will upon request advise the Commission concerning the disposition of the funds received or retained by the Commission as liquidated damages. Title 55, Section 242, Code of Alabama 1940, as emended by Act No. 299, General Acts 1943, page 259.

Yours very truly,

SI GARRETT,

Attorney General

August 17, 1951

Hon. P. C. Black

Judge of Probate

Geneva County

Geneva, Alabama

Counties — Gasoline — Comptroller — Highways and Highway Departments.

1. A county legally may, by proper resolution of the county governing body, designate a bank or trust company as agent to receive the funds payable to the county under Section 6 of the "Farm to Market Road Act of 1943." (Act No. 329, General Acts 1943, page 311, as amended.)

2. Where a bank or trust company has properly been designated as county's agent to receive the funds payable to the county under Section 6 of the "Farm to Market Road Act of 1943" (Act No. 329, General Acts 1943, page 311, as amended), the Chief of the Bureau of County Aid legally may, on formal request by proper county official as the work progresses, requisition payment of such funds to such agent.

3. Where a bank or trust company has properly been designated as a county's agent to receive the funds payable to the county under Section 6 of the "Farm to Market Road Act of 1943" (Act No. 329, General Acts 1943, page 311, as amended), and where the Chief of the Bureau of County Aid properly has requisitioned payment to such

agent, the State Comptroller legally may draw warrants upon the Treasurer in favor of such agent and may deliver such warrants to the agent.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of August 1, 1951 is as follows:

"Section 6, of Act No. 329, General Acts of Legislature 1943, page 311-13 provides:

" 'The cost of construction of such County roads shall be paid by the County from the funds set aside hereunder. State funds will be paid to the County, on formal request by proper County officials, upon approval by the Chief of the Bureau of County Aid as the work progresses out of the State County Aid Fund upon requisition of the Chief of the Bureau of County Aid by warrant drawn by the State Comptroller upon the Treasurer, as herein provided. The County shall permit the Chief of the Bureau of County Aid to have access at all times to County records relating to these construction funds.'

"1. Can the Court of County Commissioners of Geneva County by proper resolution, legally designate a Bank or Trust Company as its agent to receive the funds referred to in said Section 6?

2. Can the Chief of the Bureau of County Aid on formal request by proper County Officials, legally requisition payment to such designated agent out of such funds as the work progresses and as the funds accrue?

3. Can the State Comptroller legally draw warrants upon the Treasurer in favor of such agent, against such State County Aid Fund upon requisition by the Chief of the Bureau of County Aid, and deliver the same to such agent?"

I am of the opinion that your first question should be answered in the affirmative.

Act No. 329, General Acts 1943, page 311, is the so-called "Farm to Market Road Act of 1943." The Act has been amended numerous times, but not in respects here material. Section 6 thereof has not been amended, and provides that:

"The cost of construction of such county roads shall be paid by the County Aid by warrant drawn by the State Comptroller upon the Treas-**county,** on formal request by proper county official, upon approval by the Chief of the Bureau of County Aid as the work progresses out of the State County Aid Fund upon requisition of the Chief of the Bureau of County Aid by warrant drawn by the State Comptroller upon the Treasurer, as herein provided. The County shall permit the Chief of the Bureau of County Aid to have access at all times to county records relating to these construction funds." **(Emphasis supplied.)**

The funds in question are State funds payable to the county from the State County Aid Fund, are appropriated by Section 3 of Act No. 329, as amended, and represent a part of the State Gasoline Excise Tax.

In a previous opinion of this office found in Quarterly Report of Attorney General, Vol. 30, page 112, there was under consideration the distribution of the county's part of the State Gasoline Excise Tax, under the provisions of Title 51, Sections 655 and 657, Code of Alabama 1940. Section 655, supra, expressly requires that payment to the counties out of the State Gasoline Excise Tax "be made by state warrant to be mailed to the treasurer of such counties or depositories of such counties, on or before the tenth day of each month following collection," and Section 657, supra, contains a substantially identical provision.

In that opinion it was held that, where the county has authorized or requested monthly payment of state gasoline tax money, or any part thereof, to a bank as agent or trustee for holders of its gasoline tax warrants, the State Comptroller should continue to make such payments, so long as there are sufficient funds to the credit of the county to make the same. See, also, Quarterly Report of Attorney General, Vol. 17, page 202.

The situation presented in your request is analogous to that considered in the above opinions. Therefore, I am of the opinion that the county governing body of Geneva County, by proper resolution, legally may designate a bank or trust company as the county's agent to receive funds payable to the county under Section 6 of Act No. 329, supra.

2. I am of the opinion that your second question should also be answered in the affirmative.

It will be seen above that the county governing body legally may designate an agent to receive the funds payable under Section 6 of Act No. 329, supra. That section expressly provides that, on formal request by proper county official, such funds will be paid to the county as the work progresses, upon requisition of the Chief of the Bureau of County Aid by warrant drawn by the State Comptroller upon the Treasurer. Payment of such funds to the county's legally designated agent is, in my judgement, the equivalent of payment to the county.

3. I am of the opinion that your third question should likewise be answered in the affirmative.

Since designation of a bank or trust company as agent to receive such funds is lawful, and since payment to a legally designated agent is equivalent of payment to the county, it follows that the State Comptroller legally may, upon proper requisition of the Chief of the Bureau of County Aid as the work progresses, raw warrants in favor of such agent, against the State County Aid Fund, and may deliver such warrants to such agent.

Yours very truly,

SI GARRETT,

Attorney General

August 23, 1951

Mrs. Nell Jo Reagan

Acting Judge of Probate

Etowah County

Gadsden, Alabama

Taxation — Filing Tax — Mortgages.

A mortgage filing tax, under Title 51, Section 619, Code of Alabama 1940, is due when an agreement, between principal and surety, that surety will indemnify principal on an appeal bond and that principal in return pledges certain property and mortgages certain property as collateral in order to obtain the bond, is offered for record.

Opinion by Assistant Attorney General Nachman.

Dear Madam:

Your request for an official opinion bearing date of February 20, 1951 is as follows:

"A recent suit by J. Ralph Hart VS Lawrence Products Co., Inc. and Benjamin Kahn, gave J. Ralph Hart a judgement against the Lawrence Products Co., Inc., and Benjamin Kahn for the sum of $100,000.00.

"Lawrence Products Co., Inc., wishing to appeal had to furnish an Appeal Bond in the amount of $100,000.00. This bond is being made by the Fidelity and Guaranty Co. as shown by enclosed Mtg. Exhibit.

"Before this bond could be made it was necessary for Lawrence Products Co., Inc., to produce enough collateral to protect the Fidelity and Guaranty Company, as shown by enclosed instrument.

"At the time this instrument was presented for recording, Mr. Loeb contended that the real estate described in the said instrument was the taxable portion of the mortgage, Mortgage tax to be computed on $50,-000.00. This office was of the opinion that tax levied under Title 51, Section 619, should be computed on this and also the property set out in paragraph 1 of said instrument. With those two views in mind, we contended that it should have been on the amount of $100,000.00. Also on Page 1 (A) of said instrument, as further inducement to the executor of said bond, they mortgaged the real estate mentioned and pledged the said bonds and jewelry. The word pledge seems to be the determining factor or key word.

"Question.

1. Is a pledge the same as a mortgage? If your answer is in the positive, then according to Title 51, Section 619, they would be required to pay the Probate Judge another $75.00 for mortgage tax; or in your opinion, would there by any additional tax due on this instrument.

"Enclosed you will also find a letter from Mr. Loeb to Frank A. Reagan, stating his facts."

The facts of your request indicate that the problem involved is whether or not a mortgage filing tax is due when an instrument pledging certain personal property and mortgaging certain real property as collateral for the execution of an indemnity bond and appeal bond is offered for record. The facts further indicate that the collateral is to secure the surety on an appeal bond against possible payment of a judgement debt outstanding against the principal on the bond. The amount of the judgement is $100,000, and this judgement constitutes a debt which has not been satisfied.

If the appeal is successful, presumably the judgement debt of $100,000 will be eradicated, and in that case obviously there will be no debt existing between the principal and the surety on the appeal bond. If the appeal is unsuccessful, and the principal pays off the judgement debt of $100,000, then there will also be no debt between principal and surety. If, however, the appeal is unsuccessful, and the principal does not pay the judgement debt of $100,000, the debt will be outstanding between the principal and the surety may then realize on the person property pledged and on the mortgaged realty.

It is clear, therefore, that the indebtedness existing between the parties to the instrument offered for record, is, in a sense, a contingent or conditional indebtedness. Nevertheless, this office has held that such a condition or contingency is not enough to avoid the mortgage filing tax (now Title 51, Section 619, Code of Alabama 1940). Opinions of the Attorney General, Office Edition, Volume 2-A, page 73. in this opinion, in a factual situation where a mortgage was given to secure an appearance bond to protect the mortgagee for whatever amount he might have to pay under the appearance bond, it was held:

"In reply I advise that in my judgement, the maximum amount secured is $5,000.00. True the indebtedness is a conditional one and defeasance of the title of the mortgagee, is accomplished by the performance of an act rather than the payment of the amount secured.

"Nevertheless, there is a contingent liability on the mortgagee for $5,000.00, and the mortgage is given to secure him for that sum.

"I am, therefore, of the opinion that mortgage tax should be collected on such amount."

This opinion would seem to answer the objection that since the indebtedness in the instant situation is a conditional or contingent one, it is not such an indebtedness as is within the intent and meaning of Section 619, supra.

The next question is what the amount of the tax should be. The proper amount is $150.00—or fifteen cents per hundred on a one hundred thousand dollar indebtedness. All the property described in the instrument at hand has been either pledged or mortgaged to secure the "indebtedness" of $100,000. It is possible to avoid entirely the question of whether or not a pledge is within Section 619, supra, because the property behind the mortgage might be valuable enough to cover the whole $100,000.

But even if we must turn the question of whether or not a pledge is within the meaning of Section 619, supra, we think that it is. The language of the statute reads:

"No mortgage, deed of trust, contract of conditional sale, or other instrument of like character, which is given to secure the payment of any debt, which conveys any real or personal property situated within this state, or any interest therein, shall be received for record unless. . . ."

The instrument of pledge is certainly given to secure a "debt." (The question of whether or not an existing or potential debt is within the meaning of the statute has been disposed of above.) We also think that the phrase "conveys any real or personal property" is satisfied. A pledgee acquires a certain special property interest in the pledged chattel. The pledgor loses certain property rights, and if statutory requirements have been met, may not transfer a good title to the chattel so long as the pledgee has a special property interest. Upon satisfaction of the debt for which the pledge is given, full property rights are again restored to the pledgor.

While it is true that there are vital distinctions between pledges and mortgages, a pledge transaction is sufficiently like a mortgage transaction to come within the provisions of Section 619, supra.

In summary, an additional $75.00 should be paid the probate judge prior to recordation of the instrument in question; and, for the purposes of your case, you may treat a pledge as being within the scope of Section 619, supra.

Yours very truly,

SI GARRETT,

Attorney General

August 29, 1951

Hon. R. A. Mitchell,

Hon. H. S. Sargent,

Hon. E. F. Mauldin,

Members, Colbert County Board of Education

Tuscumbia, Alabama

County Boards of Education — County Superintendents of Education — Schools — State Superintendent of Education.

1. County board of education is charged with responsibility of administering county public school system.

2. Employees of county board of education are employed by the board from nominations by county superintendent of education.

3. State Superintendent of Education may settle controversies between county superintendents of education and county boards of education.

4. Extent to which county board of education may go to insure effectiveness of its policies must be determined in individual case.

Opinion by Assistant Attorney General Strab.

Gentlemen:

Your request for official opinion bearing date of June 22, 1941, is as follows:

"Realizing the magnitude of important duties to which you must attend it is with hesitation that we call on you for your counsel and advice. However, the benefit of your opinion and the wisdom of your advice will be worth much to a new member of the Colbert County Board of Education.

"Some of the questions set out below may seem to you as having no necessity, for it is apparent that if a board of education were powerless to initiate and adopt a policy of its own there would be no excuse for the operation of the board as such at the taxpayers expense. Nevertheless you will be doing a great favor in clearing these matters up.

"1. Is the responsibility placed on the County Board or the elected Superintendent to see that the taxpayer gets value received for school money spent by the county system?

"2. What is the correct procedure for the county board in employing its personnel; custodian of funds, building supervisor, transportation supervisor, repair crew, teachers, bus drivers, etc?

"3. In the remote event the superintendent should not concur with the unanimous opinion of the board in regard to policies that are non instructional whose opinion prevails?

"4. To what extent is the Board of Education required to go to see that a policy it initiates and unanimously approves is put into effect?

"For the purpose of directly identifying the above points with your opinion it would be appreciated if you could number the corresponding answer the same as the question.

"Is it within the authority of the board to determine where the building program funds are spent?"

In considering your request, I will answer your questions in order of their presentation.

1. By virtue of Title 52, Section 62, Code of Alabama 1940, the "general administration and supervision of the public schools of the educational interests of each county" is vested in the county board of education. The effect of this section is a delegation to the county board of education of complete control of the educational affairs of the county, to be exercised in its discretion, except as limited by law. Biennial Report of Attorney General, 1934-36, page 263. It is my opinion that the county board of education is responsible for seeing that the taxpayer gets "value received for school money spent by the county system."

2. Title 52, Section 86, Code of Alabama 1940, provides that the county board of education shall appoint, upon the written recommendation of the county superintendent of education, all principals, teachers, clerical and professional assistants authorized by the board. Title 52, Section 70, Code of Alabama 1940, provides that the county board of education shall appoint a custodian of public school funds. Title 52, Section 123, Code of Alabama 1940, provides that the county superintendent of education shall nominate, in writing, for appointment by the county board of education all principals, teachers, and all other regular employees of the board.

In view of the above sections of the Alabama Code, it is my opinion that employment of regular employees of the county school board must be accomplished by means of a written nomination by the county superintendent of education. This nomination must be accepted by the county board of education before the person nominated becomes an employee of the board.

3. In the event a controversy arises between the county superintendent of education and the county board of education, which controversy cannot be settled between the parties, the matter should be laid before the State Superintendent of Education, who is given power and authority to settle all controversies and disputes involving the proper administration of the public school system. Title 52, Sections 44 and 47, Code of Alabama 1940. See also Quarterly Report of Attorney General, Vol. 13, page 95.

4. Title 52, Section 86, Code of Alabama 1940, provides, inter alia, that, "The county board may suspend or dismiss for immorality, misconduct in office, **insubordination,** or incompetency or wilful neglect or duty, or whenever, in the opinion of the board, the best interests of the school require it, superintendent, principals, teachers, or any other employee or appointees of the board, subject to the provisions of chapter 13 of this title (Teacher Tenure Law)." (Emphasis supplied.) (This section is not applicable to the county superintendent of education of Colbert County, for the reason that he is elected under the provisions of Act No. 38, Local Acts 1931, page 11, for a fixed term of office, and therefore, can be removed only by impeachment.)

In view of the above statute, it is my opinion that, if necessary, the county board of education could dismiss an employee for insubordination, subject to the provisions of Title 52, Chapter 13, Code of Alabama 1940, if such employee refused to carry out the policies of the board. However, whether or not such drastic action should be taken would depend on the facts of each individual case, and this opinion should not be construed as recommending such action in all cases.

In reference to your last inquiry as to the authority of the board to determine whether building program funds are to be spent, inasmuch as funds for building programs are derived from several different sources, it would be necessary to be advised of the source of the particular building program fund before attempting to answer your inquiry.

Yours very truly,

SI GARRETT,

Attorney General

September 4, 1951

Hon. R. L. Avery

Chief Clerk

Jefferson County

Court of Misdemeanors

507 Courthouse

Birmingham 3, Alabama

Costs and Fees — Fines — Inferior Courts — Appeals — Jefferson County — Clerks of Inferior Courts.

When a defendant in Jefferson County Court of Misdemeanors admits his guilt in open court and agrees to plead guilty and have his punishment fixed at a certain amount and costs, and the case is passed several times in order to allow the defendant to pay the fine and costs in partial payments, and defendant later pleads guilty and appeals to the circuit court, any amount paid on the fine and costs must be paid into the General Fund of Jefferson County as required by rule and regulation promulgated by the judge of said court.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of June 14, 1951, is as follows:

"I respectfully request an official opinion as to the disposition of partial payments made in the Jefferson County Court of Misdemeanors, when a plea of guilty is entered as follows:

" 'On October 12th, 1950 defendant in open court admits his guilt of the offense charged in the affidavit and agrees to plead guilty thereto, and have his punishment fixed at a fine of $150.00 and costs. The case was passed several times and the defendant was allowed to pay partial payments, to the amount of $50.00. On June 8th, 1951 the defendant was given a fine of $150.00 and costs. The defendant appealed the case to the Circuit Court.

"The Judge of this court put into effect certain rules and regulations pertaining to this court which is as follows:

"Rule #4
"Paragraph #4

"If the defendant appeals to the Circuit Court, all payments made to the clerk during the pendency of such agreement shall be paid into the General Fund of Jefferson County and shall not be returned to the defendant or his successors in interest.

"The defendant paid $50.00 on the fine and cost during the pendency of the case. I desire to know whether this amount paid by the defend-

ant shall be paid into the General Fund of the County or should it be transferred with the transcript to the Circuit Court. I will appreciate your opinion in the above matter."

It is my opinion that you, as clerk, having received the partial payment referred to in your inquiry, should pay said amount into the General Fund of Jefferson County as required by the rule of the court quoted in your inquiry.

The rule which you have set out in your inquiry plainly requires that partial payments made by a defendant shall, on appeal to the circuit court, be paid into the General Fund of Jefferson County. There is no provision in the rule directing that the partial payments be transferred with the transcript to the circuit court. In my opinion, you should follow the letter of the rule as promulgated by the Judge of the Jefferson County Court of Misdemeanors.

This opinion should not be construed as passing on the validity of invalidity of the rule above quoted.

Yours very truly,

SI GARRETT,

Attorney General

September 4, 1951

Hon. Ira Weissinger

Judge of Probate

Lee County

Opelika, Alabama

Taxation—Exemption.

Industrial plants or factories may be granted exemption from county ad valorem taxes under Title 51, Section 3, Code of Alabama 1940, as to property in existence prior to the date of application for such exemption, where application for exemption is made before the attachment of the tax lien on October 1.

Opinion by the Attorney General.

Dear Sir:

A request for an official opinion is as follows:

"I am herewith enclosing certified extract from minutes of meeting of Court of County Commissioners of Lee County, in which is set forth the petition of Pepperell Manufacturing Company presented to said Court, showing, among other things, that it is a foreign corporation, duly qualified to do business in Alabama and having its place of business in this

County and that it is engaged in the business of manufacturing textile products, etc.; that during the year 1947 it erected certain buildings and purchased certain machinery to be used in operation of its business and praying for exemption thereof authorized by Code 1940, Title 51, Section 3.

Said minutes also show order of Court granting exemption as prayed, and remitting County taxes for period asked. Said petition was presented to the Court on May 31, 1947 and order remitting County taxes was made on same date.

"Some question has arisen as to whether or not, under circumstances shown, said Court was authorized to grant the exemption claimed and remit said taxes as done by said order.

"I request and will greatly appreciate an official opinion on that question."

The facts of your request indicate that the taxpayer in question erected certain buildings prior to May 31, 1947. On May 31, 1947, a petition was presented to the county governing body pursuant to Title 51, Section 4, Code of Alabama 1940, asking exemption from county ad valorem taxes under Title 51, Section 3. The question turns upon whether or not the provision of Title 51, Section 4, supra, "proposed to locate," must be so construed that, if application is not made to the proper authorities before construction has begun, the county governing body has no authority to grant an exemption.

This situation is close to the factual context of the opinion in Quarterly Report of Attorney General, Vol. 56, page 8. The latter opinion followed the line of opinions of this office cited therein. However, there is an important factual difference. There the building was completed and operation begun therein during the month of October, 1948—after the tax lien for that tax year had attached. Application for exemption was not made until May 9, 1949. In the situation at hand, the construction of the building was begun during the year 1947, and application for exemption made on May 31, 1947—several months before the October 1 attachment of the tax lien. Thus, the opinion in Quarterly Report of Attorney General, Vol. 56, page 8, supra, must be distinguished on this basis.

It is true that Section 4 of Title 51, supra, does not explicitly give importance to the tax lien; but a reasonable construction of that section requires that the property be in existence and subject to taxation, in the sense that a lien has attached, before the taxpayer is barred from effective application for exemption.

This is not to say that a taxpayer, who has not applied for exemption before the attachment of a tax lien for one tax year, may present his application in time for the next tax year. Once a tax lien has attached for any tax year, the application for exemption comes too late.

A comparison between the language of Section 4, supra, and Section 7 of Title 51, is important. Section 7 uses the phrase, "owning or controlling or proposing to own or control any such factory * * *." Section 4, supra, uses the phrase, "proposed to locate." There does not appear to be any reason for the distinction in phraseology between the two sections. Section 4 sets out the method for obtaining the Section 3 exemption, and Section 7 sets out the method for obtaining the Section 6 exemption. It seems reasonable to construe both sections as meaning that an exemption must be made under either section before the tax lien has attached. In such case, the application is timely. Otherwise, it is too late.

For these reasons the application for exemption of the property in question from county ad valorem taxes may be granted.

The opinion in Quarterly Report of Attorney General, Vol. 51, p. 231, is modified so as to conform with the holding of Quarterly Report of Attorney General, Vol. 56, p. 8, supra, and with the holding herein.

Very truly yours,

SI GARRETT,

Attorney General

September 10, 1951

Hon. Slaught McMahan

Member of Board of Revenue

Etowah County

Gadsden, Alabama

Counties — Roads and Bridges.

A county has legal authority to enter into an agreement with a private citizen, whereby the county agrees to construct and/or maintain a roadway on such citizen's private property, and an adjacent storage area if need be, in return for the privilege of storing on such property county road building equipment, and stockpiling materials thereon, provided such agreement is necessary or desirable for the best interests of the county and the county receives full value thereunder.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, dated September 1, 1951, is as follows:

"The Board of Revenue of Etowah County contemplates entering into a contract with a private citizen and land owner, whereby the County agrees to construct and/or maintain on private property a road, and area adjacent thereto if need be, in consideration of which the land owner agrees to allow the County, to store, maintain, and repair thereon such County road building equipment as the County's needs may require, and to stockpile road building materials thereon.

"This Board's jurisdiction and responsibilities for the construction, maintenance, and repair of public county roads regularly require and demand that its road building equipment be used throughout the County and at places widely scattered and considerable distances from the county seat and from other suitable storage depots. Often it is uneconomical and inconvenient, when working public roads in isolated communities, to return such equipment, each night, to the county seat or to the regularly

established storage depots, and, because of the hazard to motor vehicle traffic, the equipment cannot be left on the public roads at night. At times it is also necessary to stockpile road building materials on private property.

"There has been submitted to this Board a proposed contract between the county governing body and a private citizen, whereby the County agrees to construct and/or maintain a roadway on such citizen's private property and an adjacent storage area if need be, in return for which the citizen guarantees to the County the right and privilege of there storing its road building equipment and stockpiling materials thereon. Your official opinion is requested on the question of whether the county governing body has legal authority to enter into such an agreement, copy of which is attached.

It is my opinion that your question should be answered in the affirmative. Title 23, Section 43, Code of Alabama 1940, reads as follows:

"The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this chapter. Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

Section 43, supra, in express terms confers upon the county governing body **unlimited Jurisdiction and powers** with regard to the construction, maintenance and improvement of the public roads, bridges and ferries in the county, in the absence of special legislation expressly limiting such jurisdiction and powers. The extent and nature of such jurisdiction and powers in such that, in the absence of fraudulent, corrupt, or unfair conduct of the county's business, the county governing body's exercise of its discretionary powers cannot be restrained or reviewed by the courts. **Ensley Motor Co. v. O'Rear, Treasurer,** 196 Ala. 481, 71 So. 704.

Section 94, Constitution of Alabama 1901, reads as follows:

"The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

The purpose of Section 94, supra, is to prevent counties, cities, and towns from making donations of public funds to private individuals, associations, or corporations. **Board of Revenue and Road Com's of Mobile County, et al v.**

Puckett, 227 Ala. 374, 149 So. 850. Anticipated public benefits do not justify a violation of this section. **Southern Railway Co. v. Hartshorne,** 162 Ala. 491, 50 So. 139.

But whether sufficient consideration moves to the county for its expenditure of public funds in constructing a roadway, and adjacent storage areas, if need be, upon private property, so as to remove such expenditure from the inhibitions of Section 94, supra, is a question addressing itself primarily to the county governing body, and not to the courts. As was stated by Mr. Justice Foster in **Board of Revenue and Road Com'rs of Mobile County, et al. v. Puckett,** supra:

> "Though we may not entertain any doubt of the last inquiry mentioned above, it is clear that whether an appropriation is a donation, or whether it is the recognition of an honorable claim against the public, and therefore for the public purpose, is primarily addressed to the Legislature. We may here concede that if the act on its face showed a claim which was not right or fairly just against the state or county, it should be classified as a donation without consideration to the public. Whether and when the courts could or should look beyond the recitals of the act to inquire into such matters is not before us. In this case, the question is controlled by such recitals."

I am of the opinion, therefore, that if in the sound judgement and discretion of the county governing body the contract in question is for the best interests of the county, and if such body has concluded that the performance of such contract is necessary properly to discharge the responsibilities imposed upon the county governing body by Section 43, supra, then the said governing body has the authority to enter into such contract. The agreement **on its face** does not show a donation without consideration to the public.

Whether the agreement is **bona fide** is a question of fact which must be determined in each case. The cost of the proposed road and the value of the privilege of storing equipment on private property, and stockpiling materials thereon, are not disclosed by the contract. Some reasonable relationship between the two must exist, or else the arrangement would constitution a donation of public funds for private purposes. If the County does not receive full value under the agreement, this would indicate a fraudulent, corrupt, or unfair conduct of the business of the County, and the agreement would be voided by the courts. **Ensley Motor Car Co. v. O'Rear, Treasurer,** supra.

Very truly yours,

SI GARRETT,

Attorney General

September 14, 1951

Hon. Joe M. Edwards

Commissioner of Revenue

Department of Revenue

CAPITOL

Ad valorem Taxes — Taxation — Exemption — Department of Revenue.

The State Department of Revenue, acting by and through the Commissioner of Revenue, has the power to extend an exemption granted pursuant to Title 51, Sections 6-9, Code of Alabama 1940, for a period not to exceed an aggregate total of ten years.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of June 5, 1951, is as follows:

"By petition to the State Department of Revenue of the State of Alabama, Beaunit Mills, Inc., a foreign corporation, prayed for an exemption from all ad valorem taxes for state purposes for a period of ten years on a plant for the manufacture of rayon yarn, a pulp product, which petitioner proposed to construct and operate on a site owned by it within the Reservation of the Alabama Ordinance Works, Talladega County, Alabama, by order dated December 30, 1948, the State Department of Revenue granted an exemption from such taxes under the authority of sections 6-9, Title 51, Code of Alabama 1940, subject to the conditions and limitations of such statutes for a period of two years, to-wit: the tax years beginning October 1, 1949 and ending September 30, 1951.

"On April 30, 1951, the Beaunit Mills, Inc., filed a petition with the State Department of Revenue praying that said Department make and enter an order extending the exemption heretofore granted its factory or plant on December 30, 1948, and praying that such extension be for a period of three years, that is, for the tax years 1952-1954, inclusive, and to terminate September 30, 1954.

"It is requested that you give me your official opinion as to whether or not the State Department of Revenue acting by and through the Commissioner of Revenue, having once granted an exemption under the provisions of sections 6 (now amended) through 9, Title 51, Code of Alabama 1940, for less than the authorized ten years as provided by the statute, has the authority to extend such exemption, the total exemption period not to exceed ten years."

The State Department of Revenue, acting by and through the Commissioner of Revenue, has authority to grant an extension of exemption heretofore granted Beaunit Mills, Inc.

It is difficult to conceive why the Commissioner should be without authority when the Commissioner could have exercised his discretion to grant a

ten-year exemption to Beaunit in the first instance. Certainly, the Legislature contemplated that many exemptions pursuant to Title 51, Section 6, Code of Alabama 1940, as amended by Act No. 93, General and Local Acts 1949, page 118, would be granted for the maximum period of ten years. There can be no question that the Commissioner of Revenue has discretionary authority and that his exercise of such discretion will not be upset in the absence of the severest sort of abuse. (No such abuse of discretion could be argued in the instant situation.) Therefore, it appears unrealistic to maintain that if the Commissioner could have granted a ten-year exemption, at the outset, he cannot not extend a two-year exemption, for whatever period he sees fit, within the ten-year maximum.

It is, of course, true that the principal purpose of Section 6, supra, was to encourage the construction, extension, and operation of certain enumerated factories and plants in Alabama. Inducement is the keynote of Section 6, supra. However, I have recently held that industries, plants, or factories may be granted exemption from county ad valorem taxes pursuant to Title 51, Section 3, Code of Alabama 1940, as amended by Act No. 92, General and Local Acts 1949, page 117, as to property in existence prior to the date of application for such exemption, where application for the exemption is made before the attachment of the tax lien on October 1. See: Opinion to Hon. Ira Weissinger, Judge of Probate, Lee County, Opelika, Alabama, dated September 4, 1951 (Ms.).

It is noteworthy that Title 51, Section 4, Code of Alabama 1940, is more restrictive than Title 51, Section 7, Code of Alabama 1940, in that the former section uses the phrase "proposed to locate," whereas the latter section uses the phrase "owning or controlling, or proposing to own or control, any such factory. . . ." This would indicate that application for exemption from state ad valorem taxation, made to the Department of Revenue, need not be presented before any construction has begun. As stated in the opinion of September 4, 1951, supra, there does not appear to be any reason for the distinction in the phraseology of the two sections. But a reading of the two sections together does indicate that a conclusion requiring application for exemption before any construction whatsoever has commenced is rigid beyond the bounds of sensible statutory construction. Similarly, in the instant situation, it is unrealistic to invoke the theory of inducement to withhold from the Commissioner the authority to grant an extension of exemption for a period within the statutory maximum. Indeed, one may reasonably point out that Beaunit Mills may have anticipated an extension of the exemption up to the maximum, and this anticipation may have been part of the inducement to come to Alabama. Certainly, no one would question the authority of the Commissioner in the first instance to grant a two-year exemption with a proviso that he would reopen the case at the end of the two-year period and consider an extension of the exemption.

No tax lien has attached to the property in question. See, opinion to Hon. Ira Weissinger, supra. I do not subscribe to the theory that the Commissioner, once having made up his mind, may not change it. It is true that in certain instances, e. g., in the making of assessments, the Department of Revenue acts as a quasi-judicial body. Thus, a final assessment, unappealed from is as conclusive as a judgment of an ordinary court. Cf. **State v. Woodroof,** 253 Ala. 620, 46 So. 2d. 553. It is not necessary to consider the question of whether or not the Department itself may inquire into an assessment which has become final. In the instant situation, no assessment has ever been made against Beaunit. The Commissioner would be acting for the department, exercising discretion as to whether or not an exemption from taxation should be granted, I know that the State Board of Adjustment has authority to reopen and reconsider orders denying claims filed with it, nothwithstanding the fact that the Board of Adjustment has no express statutory authority to do so. **State ex rel. Carmichael v. State Board of Adjustment,** 249 Ala. 542, 544, 32 So. 2d. 216.

For these reasons, I conclude that the Commissioner of Revenue has the authority to extend the exemption previously granted to Beaunit up to the statutory maximum. This opinion does not hold that the Commissioner must grant an extension to Beaunit. That is a matter which addresses itself to the sound discretion of the Commissioner. This opinion merely holds that the Commissioner has the authority to exercise his discretion to grant the extension, if he so chooses.

Yours very truly,

SI GARRETT

Attorney General

September 18, 1951

Hon. T L. Johnson, Jr.

Tax Collector

Walker County

Jasper, Alabama

Taxation — Tax Assessors — Ad Valorem Taxes — Commissions.

Where the amount of utility ad valorem tax assessments is in litigation, and one tax assessor succeeds another during the term of the litigation, commission on taxes paid after the successor tax assessor has assumed office should be paid to the predecessor.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of August 1, 1951, is as follows:

"As you know, a settlement was made in court recently on the ad valorem taxes for the years 1949 and 1950 of certain public utilities, which taxes had been in litigation. Under previous court orders these utilities had paid 50% of the taxes charged for the years mentioned.

"In the recent settlement the utilities were not required to pay additional percentage of the taxes already charged but the assessments were revised completely and new assessments for the two years have been received by the Tax Assessor of this county, which requires the present Tax Assessor to calculate and distribute the taxes in the same manner as required on the assessments originally filed.

"In this county, Miss Gladys Gunter became Tax Assessor on October 1st, 1949, succeeding Mrs. Mae Amiss Ashmore, who was Tax Assessor at the time of the original utility assessments for 1949 were filed. Mrs. Ashmore received commissions of course on that part of the taxes paid by the utilities for 1949 at the regular time.

"Now the question arises as to whether the commissions on the balance of the taxes due for 1949 should be paid to Miss Gunter or Mrs. Ashmore, since both were required to calculate and distribute the taxes for that year.

"Since I expect these taxes to be paid within the next few days, would you please let us have your opinion as early as possible."

During the course of the ad valorem tax litigation about which you have inquired, this office rendered an opinion holding that tax assessors' commissions shall be paid only from taxes actually collected. Quarterly Report of Attorney General, Vol. 60, page 19. See also **Crow v. Board of School Commissioners,** 223 Ala. 107, 152 So. 26; Title 51, Section 30, Code of Alabama 1940. The commissioners are computable on taxes actually collected and not on the basis of abstracts of assessments where such assessments are still uncollected. Nor is the compensation based upon the amount of the assessment, but rather upon the taxes actually collected. Quarterly Report of Attorney General, Vol. 51, page 47; **Crow v. Board of School Commissioners,** supra.

However, the question here is whether the tax assessor in office at the time the assessments were made is entitled to commissions once collection has been made upon the assessment, even though that person is no longer the tax assessor of the county. The criterion is who performed the duties for which the commission is to be paid. In the instant situation, the predecessor has performed these duties, even though actually ad valorem assessments against public utilities are made by the Department of Revenue. See Title 51, Sections 142, et seq., Code of Alabama 1940.

The case of **Stewart v. Sample,** 168 Ala. 270, 53 So. 182, contains the statement: "The evident intention of the last cited section is that, as to state taxes, when the assessor has made the assessment, nothing remains for him to do and he has earned his commission. The same is true as to any fees which he has earned."

A general discussion of this problem is contained in two lengthly opinions of this office. Quarterly Report of Attorney General, Vol. 17, page 153, and Quarterly Report of Attorney General, Vol. 23, page 165. The following statement appears in the latter opinion, at page 168.

"In the opinion to you, supra, I also pointed out that the commissions allowed to the tax assessor were his compensation for the performance of the services and duties required of him in connection with the assessment of property for taxation, and that his commissions accrued at the time he performs the services and duties and not at the time they are paid to him, and cited several prior opinions of this office in support of that statement. For the same reason, and on the basis of the same authorities, I also held in that opinion that the commissions of the tax collector were his compensation for the performance of the services and duties required of him in connection with the collection of taxes, and that his commissions accrued at the time he performed those services and duties. Those statements are as applicable to commissions on collections from taxes in litigation as to commissions on collections from any other source."

For these reasons, Mrs. Ashmore, the predecessor tax assessor, and not Miss Gunter, the incumbent tax assessor, is entitled to commissions on the final collection of taxes based upon the 1949 ad valorem tax assessments about which you inquire.

I further advise you that the facts set forth in the second paragraph of your request are erroneous. No new assessments or further assessments were against the utilities for the tax years involved. The Circuit Court of Montgomery County simply entered a decree, pursuant to Title 51, Section 140, Code of Alabama 1940, finding the amount of the assessments for those years erroneous, and fixing a new amount determined by the Court.

Yours very truly,

SI GARRETT,

Attorney General

September 19, 1951

Hon. J. Shannon Burch

Judge of Probate

Russell County

Phenix City, Alabama

Russell County — Bonds — Judges of Probate.

The premium on the bond of the chief clerk in the office of the Probate Judge of Russell County is not a legal claim against Russell County.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of May 25, 1951, is as follows:

"Local Act # 74, pages 40-41 provides for the payment of the salary of the Chief Clerk, etc., and Section 4 of said Act requires the Chief Clerk to enter into a bond in the sum of Twenty Five Hundred Dollars.

"Please advise me if the premium on said bond is a legal claim against the County."

I am of the opinion that your question should be answered in the negative.

Act No. 74, Local Acts 1943, page 40, provides in part as follows:

"Section 1. The Judge of Probate of Russell County is hereby authorized and empowered to appoint a Chief Clerk, to hold office at the pleasure of the Judge of Probate of Russell County, Alabama.

"Section 4. The said Chief Clerk be required to make bond payable and conditioned as required by law, in the sum of Twenty-Five Hundred Dollars."

Title 13, Section 301, Code of Alabama 1940, providing to whom the bond of the Chief Clerk shall be made payable, is as follows:

> "Such chief clerk, before he enters upon his duties, must take the oath directed to be taken by the officers of this state, and give bond with surety, payable to the judge of probate, in such sum as he may prescribe, upon which bond such clerk shall be liable to such judge in consequence of any act of misfeasance or malfeasance of such chief clerk in the duties of his office; which bond must be approved by the judge of probate, and filed and recorded in the office of the clerk of the circuit court of the county."

Under the above section, the bond of the chief clerk, in the office of the judge of probate, is payable to the probate judge and not to the county. The bond is made for the protection of the probate judge, and in no way provides protection for the county or state; for this reason, the county cannot be made responsible for the premium on such bond. Biennial Report of Attorney General 1934-1936, page 59, Biennial Report of Attorney General 1936-1938, page 152.

Very truly yours,

SI GARRETT

Attorney General

September 25, 1951

Hon. Bill Dorrough, Commissioner

Department of Public Welfare

CAPITOL

State Department of Public Welfare — Records.

1. Section 5 of Act No. 321, General Acts 1951, approved August 1, 1951 (Ms.), renders inoperative those provisions of Section 1, (a) and Section 1 (b) of said act, which require the county board of public welfare to file with the probate judge a report showing the names and addresses of all recipients of public assistance in the county receiving payments under the provisions of Title 49, Code of Alabama 1940, together with the amounts paid to each recipient during the preceding month, and requiring that this data become part of the reports filed with the probate judge, bound according to the provisions of Section 1 (b).

2. Section 4 of Act No. 321, supra, does not repeal the safeguard of information provisions of Act No. 703, Section 6 (8), General Acts 1951, approved September 5, 1951 (Ms.).

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of September 11, 1951, is as follows:

"At the recent session of the Alabama Legislature just terminated, H. B. 46 was enacted into law as Act No. 321, approved August 1, 1951. The purpose of this act was to provide for the reporting and recording of the names and addresses of persons receiving public assistance in each county and of the amounts received by them, as well as certain other information set out in that Act.

"Section 4 of Act No. 321 is as follows:

" 'All laws or parts of laws in conflict with this Act are repealed.'

"Section 5 of the Act reads:

" 'This Act shall become effective October 1, 1951, but should any portion, section, or clause be declared or adjudicated to be contrary to or inconsistent with the provisions of the Social Security Act, that portion, section, or clause of this Act shall have no further force or effect.'

"I have requested a ruling from the Federal Security Agency concerning whether or not Act No. 321, is contrary to or inconsistent with the provisions of the Federal Social Security Act. I have received the following reply and ruling from Mr. John L. Thurston, Acting Federal Security Administrator:

" 'Federal Security Agency

Washington

Zone 25

" 'Dear Dr. Dorrough:

" 'This relates to the request contained in your letter of August 2, 1951, to Miss Rhoda O'Meara, Regional Public Assistance Representative, and your letter of August 23, 1951, to the Administrator. As Acting Administrator, because of Mr. Ewing's absence, I have given full consideration to Act No. 321, House Bill 46, of the Alabama General Acts of 1951, as an amendment to the Alabama State plans for old-age assistance, aid to dependent children, aid to the blind, and aid to the permanently and totally disabled.

" 'The first sentence of section 1 (a) of this law requires that probate judges be furnished quarterly with lists of the names and addresses of recipients of public assistance and the amounts paid them. By the first sentence of section 1 (b) the probate judges are directed to post these lists in a separate record book to be available for public inspection as a public record. Section 5 provides that the act becomes effective October 1, 1951, but should any portion be declared to be contrary to or inconsistent with the provisions of the Social Security Act, that portion shall have no further force or effect.

" 'As you undoubtedly know, this act is similar to Chapter 321, Indiana Acts of 1951. The Administrator had occasion to consider carefully the legal questions involved in connection with the Indiana act and, on

July 31, 1951, concluded that the Indiana assistance plans, as amended by Chapter 321, Indiana Laws of 1951, cannot be approved under the Social Security Act. I am enclosing a copy of the opinion and findings of fact and conclusions of law on the Indiana situation.

" 'I believe that the decision on the Indiana law is a precedent which is directly applicable to the amendment of your plans by the submission of Act No. 321, and it is, therefore, my conclusion as Acting Administrator that your plans for old-age assistance, aid to dependent children, aid to the blind, and aid to the permanently and totally disabled, as affected by the above described provisions of Section 1 of Act No. 321, Alabama General Acts of 1951 cannot meet the requirements for approval under sections 2 (a) (8), 402 (a) (8), 1002 (a) (9), and 1402 (a) (9), respectively, of the Social Security Act. Grants may not be made to the State of Alabama with respect to such plans after the first sentence of section 1 (a) and the first sentence of section 1 (b), of Act No. 321 become operative.

" 'If the provisions cited above are not given force and effect by virtue of section 5, I assume section 4 would not operate to repeal any of the provisions of Alabama law regarding the safeguarding of categorical assistance information. Please advise me, promptly, if this assumption is not in accord with the State's interpretation of the effect of Section 4.

" 'Sincerely yours,

" '/s/ John L. Thurston

Acting Administrator.' "

"I request your official opinion on the following questions:

"1. Whether Act No. 321 should be inoperative, either in whole or in part, by virtue of the above set out ruling of Mr. Thurston considered in conjunction with Section 5 of Act No. 321?

"2. Whether or not Section 4 of Act No. 321 is inoperative, if there is an affirmative answer to question 1 above? More specifically, are the provisions of Act No. 703, Section 6 (8), approved September 5, 1951, still of force and effect?"

It is my opinion that certain portions of Act No. 321, General Acts 1951, approved August 1, 1951 (Ms.), are rendered inoperative by Section 5 of said Act, which reads as follows:

"Section 5. This Act shall become effective October 1, 1951, but should any portion, section, or clause be declared or adjudicated to be contrary to or inconsistent with the provisions of the Social Security Act, that portion, section, or clause of this Act shall have no further force or effect."

The inoperative portions of Act No. 321, supra, will be those portions which require the county board of public welfare to file with the probate judge a report showing the names and addresses of all recipients of public assistance in the county receiving payments under the provisions of Title 49 of the Code of Alabama 1940, together with the amounts paid to each recipient during the preceding month. These portions of Act No. 321 constitute a part of Section 1 (a) of said Act.

Obviously, the data excluded as a result of my conclusion as to Section 1 (a) should not become part of the "reports" filed with the probate judge and bound according to the provisions of Section 1 (b) of the act.

In short, because of a Federal veto, Section 5 of Act No. 321 comes into play and renders inoperative those provisions of Act No. 321, which require the furnishing of lists of names and addresses of public assistance recipients, the amounts paid to them, and the publication and preservation of such lists.

You have set out a letter from Mr. John L. Thurston, Acting Federal Security Administrator. I am assuming that he has power and authority to state that certain portions of Act No. 321 "contrary to or inconsistent with the provisions of the Social Security Act . . . ."

Mr. Thurston has stated that pursuant to the precedent set by a decision involving Indiana public assistance laws, the Federal Security Agency would be unable to approve public assistance grants to Alabama, since the provisions of the Alabama Act No. 321, discussed above, are similar to the interdicted Indiana Act. Therefore, the case becomes a clear one for the operation of Section 5 of Act No. 321. For certainly, the intent of Section 5 is that if any portion of Act No. 321 conflicts with the Social Security Act in any manner, and inferrably, results in the withholding of public assistance grants from Alabama, then those portions of Act No. 321 shall become inoperative.

Mr. Thurston has invoked Sections 2 (a) (8), 402 (a) (8), 1002 (a) (9), and 1402 (a) (9) of the Social Security Act Title 42, U. S. C. A., Sections 2 (a) (8), 402 (a) (8), 1002 (a) (9), and 1402 (a) (9).

Although it is not necessary to this opinion to set out the basis for the decision in the Indiana case, I am setting out the following portion of the opinion of the Federal Security Administrator in that case:

> "Where a statute requires machinery to be 'safeguarded,' it means that there must be some physical attachment or structure that will prevent contact with moving or other dangerous parts of the machine. It would, therefore, seem that the Indiana State Plans for assistance, as amended by Chapter 321, also cannot be approved because such plans do not provide safeguards which restrict the use of information concerning applicants and recipients to the purposes specified in the Social Security Act. Whether or not in some instances it may be impossible to do anything more to prevent misuse of information than provide criminal penalties raises questions that need not be decided at this time. Certainly, in this case, the Indiana assistance Plans, as amended by Chapter 321, cannot be held to contain the safeguards against misuse of information that are required by the Federal law. I must hold, therefore, that the Indiana State Plans for old-age assistance, aid to dependent children and aid to the blind, as amended by Chapter 321, Indiana Laws, 1951, do not contain provisions that are required by the Federal Law and consequently cannot be approved."

Since Mr. Thurston has observed that there is no significant difference between the Indiana and Alabama acts, the same decision would, of course, apply to Act No. 321.

In answer to your scond question, Section 4 of Act No. 321 does not operate to repeal the safeguard of information provisions of Act No. 703, Section 6 (8),

General Acts 1951, approved September 5, 1951 (Ms.). This latter provisions is still in force and effect.

Yours very truly,

SI GARRETT

Attorney General

September 28, 1951

Hon. Joe M. Edwards

Commissicner of Revenue

State Department of Revenue

Montgomery 4, Alabama

Opinions Overruled, Modified, or Distinguished — Licenses — Moter Vehicles — License Inspectors — Fines — Highway Patrol.

1. Since under the provisions of Title 36, Section 71, Code of Alabama 1940, members of the highway patrol, when so authorized in writing by the Governor, have the power of peace officers in this state, such members have legal authority to arrest and prosecute motor vehicle operators for a violation of the revenue laws of this state levying licenses on motor vehicles.

2. Opinion found in Quarterly Report of Attorney General, Vol. 58, page 119, is hereby modified, corrected and amended so as to conform with the above conclusion.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of September 27, 1951, is as follows:

"Your attention is drawn to that certain opinion rendered on March 27, 1950, to the Honorable Bankhead Bates, Director of the State Department of Public Safety, dealing generally with motor vehicle license tags and specifically with violations of Title 36, Section 75, and Title 51, Section 834 Code of Alabama 1940. This opinion is reported in Quarterly Report of the Attorney General, Vol. 58, at page 119, et seq.

"It is noted that the opinion in question states as follows:

" 'In such a case, therefore, the highway patrol has no authority to arrest him or to institute proceedings against him. Section 835, supra, provides that the license inspector shall institute proceedings in such cases. For the highway patrol to make the arrest and institute criminal proceedings would be an infringement upon the duties of the license inspector.'

"Since Title 36, Section 71, Code of Alabama 1940, provides that members of the highway patrol shall have the power of peace officers, when so authorized in writing by the Governor, I respectfully request your re-consideration of the statement quoted above."

I am of the opinion that the statement in question is in error. Therefore, it is hereby withdrawn and the opinion reported in Quarterly Report of the Attorney General, Vol. 58, page 119, is hereby modified, corrected, and amended accordingly.

Title 36, Section 71, Code of Alabama 1940, in part expressly provides that:

"Members of the state highway patrol when so authorized in writing by the governor shall have the power of peace officers in this state and may exercise such powers anywhere within the state."

It is my information and belief that in the past the various governors of this state have, from time to time, issued executive orders implementing the quoted provisions of Section 71, supra, and that the commissioned and non-commissioned officers and members of the highway patrol are at present clothed with the power of peace officers by virtue of an unrevoked executive order issued on the 11th day of May, 1943, by the then Governor, the Honorable Chauncey Sparks, which I quote:

"EXECUTIVE ORDER

"TO: Captain Van Buren Gilbert

Director of Public Safety

"In accordance with the provisions of Section 13, Acts of 1939, page 30, Title 36, Section 71, Code of 1940, I hereby authorize and direct that you, as Director of Public Safety, and all of the commissioned and non-commissioned officers and members of the State Highway Patrol shall have the power of peace officers in this State and may exercise such powers anywhere within the State.

"You are requested to acknowledge receipt of this authority.

"(Signed) **CHAUNCEY SPARKS**

Governor

"DATED this the 11th day of May, 1943."

The power of members of the highway patrol, when so authorized in writing by the Governor, to exercise the power of peace officers in this state was interpreted and sustained by the Supreme Court of Alabama in the recent case styled **Roberts v. State ex rel. Cooper,** 253 Ala. 565, 46 So. 2d 5, in which it was decided that members of the highway patrol, when acting under written orders of the Governor, had statutory authority under Section 71, supra, as peace and law-enforcement officers, to seize coin-operated slot machines as illegal gambling devices.

I am of the opinion, therefore, that members of the highway patrol, when so authorized in writing by the Governor have the power of peace officers in

this state, and hence have the power and authority to arrest and prosecute motor vehicle operators for a violation of the revenue laws of this state levying licenses on motor vehicles.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. Pat Byrne

Commissioner of Licenses

Mobile County

P. O. Box 91

Mobile, Alabama

Taxation — Licenses — Motor Vehicles.

1. A nonresident serviceman living in Alabama in compliance with military orders must have paid the license, fee, or excise tax on his motor vehicle required by the state of his domicile in order to qualify for exemption from Alabama ad valorem and license taxes under the Soldiers' and Sailors' Civil Relief Act.

2. A nonresident serviceman, who elects to purchase Alabama license plates after the expiration of the license of his state of domicile, is required by statute to pay ad valorem taxes to the State of Alabama if the motor vehicle was brought into the State after October 1 and prior to the last Monday in February next following.

3. Quarterly Report of Attorney General, Vol. 53, page 59, modified to conform to the holding of this opinion.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of August 14, 1951, is as follows:

"I respectfully direct your attention to an opinion rendered November 9, 1948, to Mrs. Sadie P. Gardner, Tax Assessor, Dallas County, Selma, Alabama, (Quarterly Report of the Attorney General of Alabama, Vol. 53, p. 59). There is a question in my mind concerning the liability of nonresident servicemen for ad valorem tax on motor vehicles, mentioned in the paragraph, which I quote, as follows:

" 'Such nonresident persons who are entitled to the benefits of said act and who elect to purchase an Alabama motor vehicle license rather than obtain such license from the state of their domicile or resident (sic),

are not liable for the Alabama ad valorem tax upon such motor vehicle. Such election to obtain an Alabama motor vehicle license may be made without penalty within such time as may be obtained without penalty in the state of his residence or domicile (as construed by the Soldiers' and Sailors' Civil Relief Act).'

"We have had several inquiries from non-resident servicemen, stationed here at Brookley Air Force Base, who purchased license plates for this current year, 1951, and they expect to be stationed here for several months more, possibly another year.

"We also direct your attention to that portion of the United States Code Annotated, Title 50, Section 574, paragraph 2, which we quote, as follows: 'When used in this section, (a) the term "personal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, that the license, fee, or excise required by the State, Territory, possession, or District of Columbia which the person is a resident or in which he is domiciled has been paid.'

"The non-resident servicemen inquiring about the ad valorem tax, do not reside on the Government reservation, as they have moved their families down here.

"If these servicemen buy a 1952 Alabama license plate, are they liable for the ad valorem tax, if the motor vehicle entered the State on or prior to the last Monday in February? If your answer is in the negative, should we require these servicemen to furnish us with a Duplicate receipt showing that the tax has been paid in their resident state for the preceding year, 1951, or for the current year, 1952?"

In general, nonresidents operating motor vehicles are required to obtain Alabama license plates thirty days after entering the state. Title 51, Section 707, Code of Alabama 1940. While nonresident servicemen not living on federal reservations come within the scope of Section 707, supra, the Soldiers' and Sailors' Civil Relief Act permits a choice between paying the license, fee, or excise required by the state of domicile upon the expiration of the license granted by the state, and obtaining motor vehicle licenses in Alabama. Title 50, Section 574, United States Code Annotated.

Under the above section of U. S. C. A., the personal property of a nonresident serviceman stationed in a state under military orders is deemed not to have acquired any situs there for the purpose of taxation, provided that the serviceman has paid the license, fee, or excise required by the state of his domicile.

Thus, a nonresident serviceman is only entitled to coverage under the Soldiers' and Sailors' Civil Relief Act when he has complied with the proviso requiring that he pay the license, fee, or excise imposed by the state of his domicile.

If a serviceman obtains a license in Alabama instead of the state of his domicile, the Soldiers' and Sailors' Civil Relief Act, by its own terms, does not apply. In such case, the situs of the property being in Alabama, there is jurisdiction for the assessment of ad valorem taxes on the motor vehicle by the State of Alabama.

The opinion referred to in your inquiry, rendered by this office on November 9, 1948, to Mrs. Sadie P. Gardner, Tax Assessor, Dallas County, and found in Quarterly Report of Attorney General, Vol. 53, page 59, stated the following:

> "Such nonresident persons who are entitled to the benefits of said act and who elect to purchase an Alabama motor vehicle license rather than obtain such license from the State of their domicile or resident (sic), **are not liable** for the Alabama ad valorem tax upon such motor vehicle.."

On further consideration, I find the above statement incorrect. As explained above, nonresident servicemen, who elect to obtain Alabama motor vehicle licenses rather than obtain such licenses in the state of their domicile, do not come within the coverage of the Soldiers' and Sailors' Civil Relief Act. As a condition precedent to the issuance of Alabama motor vehicle licenses, such nonresident servicemen would, therefore, be required to pay ad valorem taxes on motor vehicles brought into the State after the first day of October and before the tax assessor has completed his assessment. Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 314, General Acts 1945, page 504. (The completion of the assessment by the tax assessor is required to be made not later than the last Monday in February. Title 51, Section 57, Code of Alabama 1940.)

In short, if a serviceman elects to obtain Alabama motor vehicle licenses, the exclusionary provisions of Section 574, U. S. C. A., supra, are not invoked, and Alabama has jurisdiction to impose the taxes required by Section 704, as amended, supra.

For the reasons enumerated above, the servicemen covered in your inquiry are liable for ad valorem taxes on motor vehicles in Alabama. That portion of the opinion found in Quarterly Report of Attorney General, Vol. 53, page 59, which has been quoted above, is hereby modified to conform with the holding of this opinion.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Dr. Lee Weatherington

County Health Officer

Marshall County Department of Public Health

Guntersville, Alabama

Marshall County — Hospitals — Taxation — Constitutional Amendments.

The Hospital Board of Marshall County may not appropriate funds from the special county 4-mill tax authorized to be levied by Amendment No. 72, Constitution of Alabama 1901, for the operational expenses of the Marshall County Health Department.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of August 14, 1951, is as follows:

"The attorney for Marshall County has advised me to seek ruling from you on the following:

"May the Hospital Board of Marshall County, at their discretion, appropriate funds for the operational expenses of the Marshall County Health Department.

"The ballot on the proposal to levy the tax read as follows:

" 'Shall there be levied a special county tax of four mills on each dollar of taxable property in the county, to be used solely for acquiring, by purchase, lease or otherwise, constructing, operating, equipping or maintaining county hospital or other public hospital, non-profit hospital and public health facilities.'

"An opinion from you on the question stated above will be appreciated."

Amendment No. 72, Constitution of Alabama 1901, proclaimed ratified November 15, 1948, provides in part as follows:

"If the tax is authorized by vote of a majority of the qualified electors of the county who participates in any election called for that purpose, the governing body of every county except Mobile, Montgomery and Jefferson Counties must levy and collect, in addition to all other taxes authorized by law, a special county tax, not exceeding four mills on each dollar of taxable property in the county to be used solely for acquiring, by purchase, lease, or otherwise, constructing, operating, equipping, or maintaining county hospitals, or other public hospitals, non-profit hospitals and public health facilities."

I am of the opinion that this amendment contemplates that the money raised by means of the 4-mill tax must be used exclusively for the acquisition of public hospitals and public health facilities, and the construction, equipment, operation, and maintenance thereof. No provision is made for any other use of the funds. See **In Re Opinion of the Justices,** 252 Ala. 194, 41 So. 2d. 559.

Therefore, it is my conclusion that the Hospital Board of Marshall County may not appropriate funds for the operational expenses of the Marshall County Health Department. See also Quarterly Report of Attorney General, Vol. 62, page 66.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. Herman K. Longshore

Judge of Probate

Lauderdale County

Florence, Alabama

Filing Tax — Taxation — Mortgage — Leases.

Instrument assigning lease as additional security for original mortgage, where the amount and the date of maturity of the original mortgage debt remain unchanged, may be received for recordation without payment of mortgage filing tax, provided a mortgage filing tax has been paid for recording the original mortgage instrument.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion, bearing date of May 10, 1951, is as follows:

"Re: **Request for Official Opinion**

"Please advise whether or not I should require the payment, under Sections 618 or 619 of Title 51 of the 1940 Code, of a mortgage or deed tax as a condition to my acceptance for recording a certain assignment of lease, a photostatic copy of which is attached, under the following facts:

"On August 22, 1950, a mortgage from Warehouses, Inc., a South Carolina corporation, to Provident Life and Accident Insurance Company, conveying certain property in this county as security for a $40,000.00 loan, was filed in my office and the mortgage tax was paid in full. The assignment of lease is made as additional security for the same debt and is an assignment from Warehouses, Inc., to the Provident Life and Accident Insurance Company. However, the lease is between Warehouses, Inc., as the lessor, and Sears, Roebuck Company as the lessee, and **has not been recorded in this office.** There would be no question in my mind about accepting the assignment of lease without tax if the original lease which it purports to assign had been recorded and the tax paid thereon.

"Attorney C. A. Poellnitz, who represents the mortgage, Provident Life and Accident Insurance Company, has called my attention to the following portion of Section 619 of Title 51:

" 'The privilege taxes required by law to be paid on mortgages, deeds of trust, and similar instruments shall not be required on or for the filing of any such instrument, providing additional or substantial security for any indebtedness secured by an instrument previously filed, upon the filing of which the taxes provided by law have been paid or which was filed at the time when no such privilege taxes were required by law, provided the secured indebtedness remains unchanged in amount and in time of maturity.' "

From the facts set out in your request, and from the attached instrument of assignment, it appears that the instrument in question, assigning a lease, was given as additional security for a previously existing mortgage. It also appears that that mortgage was filed in your office, and a mortgage tax paid on this original mortgage instrument. In addition, the assignment of the lease secures the original mortgage debt without changing the amount of that debt or the date of its maturity. The assignor, and the mortgagor and the lessor are the same. In short, the property rights of the mortgagor as lessor are assigned to the mortgagee as additional security for the original mortgage debt.

Your situation, therefore, comes within Title 51, Section 619 (d), Code of Alabama 1940. Also, it is within the test laid down in Quarterly Report of Attorney General, Vol. 19, page 181, and Quarterly Report of Attorney General, Vol. 24, page 234.

You should accept this instrument for recordation without payment of an additional filing tax.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. T. J. Land, Sr., Chairman

Walker County Board of Revenue

Jasper, Alabama

Coroners — Officers and Offices — Sheriffs.

The coroner of a county may not serve as chief deputy sheriff in view of the inhibitions of Section 280, Constitution of Alabama 1901, and Title 41, Section 5, Code of Alabama 1940.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of May 3, 1951, is as follows:

"We respectfully request your official opinion as to the following matter: can an individual who is serving as coroner of Walker County also serve as Chief Deputy Sheriff of Walker County, Alabama. Would the holding of these two offices be in conflict with Section 5 of Title 41 of the 1940 Code of Alabama and Section 280 of the Constitution of Alabama? The salary of both offices is paid out of the general fund of Walker County, Alabama.

"We request an immediate opinion on this matter if possible."

In this connection, your attention is called to Title 54, Section 3, Code of

Alabama 1940, as amended by Act No. 635, General and Local Acts 1949, page 976, which provides in part as follows:

> "In all counties of the State of Alabama in which the sheriff is not on a salary basis under and by virtue of a constitutional amendment, the sheriff of such county must have one deputy, and may have as many other deputies as he may think proper, **but the coroner of such county shall not be appointed a deputy.**" (Emphasis supplied.)

This office has previously held that a coroner is a public officer, subject to the provisions of the law governing the payment of fees of public officers. Quarterly Report of Attorney General, Vol. 24, page 88. It has also been held that a chief deputy sheriff is an officer. Biennial Report of Attorney General, 1926-28, page 237.

In view of the above quoted statute and holdings of the above opinions, it is my opinion that a person who is serving as coroner of Walker County may not also serve as chief deputy sheriff. The holding of both of said offices would constitute the holding of two offices of profit, and hence would be violative of Section 280 of the Constitution of Alabama 1901, and Section 5, Title 41, Code of Alabama 1940.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Mrs. Agnes Baggett

Secretary of State

CAPITOL

Judges — Secretary of State.

Under the provisions of Title 55, Section 194, Code of Alabama 1940, the Secretary of State is required to distribute free of charge to the supernumerary judges of this State one copy of each volume of the acts and resolutions passed or adopted by the Legislature of Alabama.

Opinion by Assistant Attorney General Hardin.

Dear Mrs. Baggett:

Your request for an official opinion, bearing date of July 2, 1951, is as follows:

> "The Secretary of State is in receipt of a letter from a supernumerary judge of Alabama requesting a set of the Acts of Alabama, 1949, and requesting that his name be placed on the official distribution list for all future acts.

"Title 55, Section 194, Code of Alabama, 1940, provides in part:

'The secretary of state must . . . distribute . . . to each judge of the supreme court, court of appeals, circuit court. . . one copy of each volume. . .

"Please advise me if Section 194, supra, authorizes me to distribute free of charge the Acts of Alabama, 1949, and all subsequent sets of the supernumerary judges of Alabama."

In my opinion, your inquiry should be answered in the affirmative.

As you have indicated, Title 55, Section 194, Code of Alabama 1940, provides that the secretary of state shall distribute to each judge of the supreme court, court of appeals and circuit court, one copy of each volume of the acts and resolutions of each session of the State legislature. This particular statute has long been a part of the statutory law of this State.

In your request you advise that you are in receipt of a letter from a supernumerary judge of Alabama requesting that he be furnished a set of the acts of the 1949 Session of the Legislature, and that he be placed on the official distribution list for future acts. You fail to advise as to whether such supernumerary judge of the appellate courts of the state or a supernumerary circuit judge. However, I feel that in either instance the answer to your inquiry is in the affirmative, and that such person should be furnished with a copy of the acts and resolutions of the Legislature enacted or adopted at each session thererof.

Title 13, Section 31, Code of Alabama 1940, as amended by Act No. 243, General and Local Acts 1949, page 367, provides for the appointment of supernumerary judges from among the members of the Supreme Court who have attained the qualifications therein set out. The duties and powers of such supernumerary judges so appointed under the provisions of the preceding statute are prescribed by Title 13, Section 32, Code of Alabama 1940, which is in part as follows:

". . Such supernumerary judges shall be vested with and may exercise all the duties and functions of a judge of such courts, and shall have and exercise all the authority and power of such judicial officer. . . . ."

Further provision for the appointment of supernumery judges from among the members of the Court of Appeals is found in Act No. 228, General Acts 1947, page 92. Here again it is specified that a supernumerary judge so appointed shall perform the duties and exercise the authority of the office to which he is assigned by the Chief Justice or the Governor.

Authority for the appointment of supernumerary circuit judges is found in Act No. 288, General Acts 1945, page 478. It is provided by such act that supernumerary circuit judges so appointed thereunder shall have and exercise all the duties, power, and authority of judges of the circuit courts, and shall, upon request to the Governor, or upon the request of the Chief Justice of the Supreme Court, preside at any regular, special, or adjourned term of any circuit court of any of the judicial circuits of Alabama.

It is to be noted than in each instance above set out relative to the appointment of supernumerary judges it is provided that such officers shall be vested with all the power and authority exercised by those judicial officers

now serving as members of our appellate or circuit courts. The only distinction between an officer serving as a member of either of such courts and an officer serving as a supernumerary judge thereof is that one devotes his entire time to the performance of his duties while the latter serves only upon request or assignment by the duly constituted authorities.

Such being the case, it is my opinion that such supernumerary judges are entitled to receive, and should receive, a copy of the acts and resolutions passed or adopted by each session of the Legislature of this State. The authority for you to furnish and distribute copies of such acts and resolutions to supernumerary judges of this State is found in Section 194, supra, providing that the judges of the Supreme Court, Court of Appeals and Circuit Courts are to receive copies of such acts and resolutions. Clearly, it was the intent of the original framers of this statutory provision that each member of our judiciary be provided with current copies of the acts and resolutions of our Legislature, and it is my opinion that the supernumerary judges of our State, now provided for by subsequent legislation, fall within the terms and meaning of Section 194, supra.

You are, therefore, advised that you must distribute free of charge the acts of the Legislature to the supernumerary judges of this State.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. William J. O'Connor, Clerk

Circuit Court of Mobile County

Mobile, Alabama

Bonds — Sureties — Costs and Fees.

Sureties on a detinue bond, guaranteeing the successful prosecution of a suit, or else agreeing to pay damages or costs may accrue to the defendant, are not liable on execution issued against them for the costs, without suit upon the bond, unless the provisions as set out in Title 7, Section 923, Code of Alabama 1940, are all fulfilled, and a summary judgement rendered upon the fulfillment of these provisions.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of March 10, 1951, is as follows:

"Your opinion is requested in reference to the following matter:

"Morgan Plan Company, Inc. filed an Affidavit and Bond in a Detinue suit on July 13, 1947, against Woodie Earl Beverly. For your convenience, a copy of the bond is attached hereto which shows that Morgan Plan Company, Inc., is principal, and W. D. Martin and Joseph W. Mitchell, are sureties. On August 23, 1947, the Sheriff of Mobile County took into his possession the automobile involved in this suit. On August 28, 1947, the defendant filed with the Sheriff of Mobile County, Alabama, a bond as required by Title 7, Section 920, a copy of which bond is also attached. On June 10, 1949, this case was tried and a jury and verdict was rendered in favor of the defendant. A copy of the judgement entry is attached hereto.

"Question 1—Should I as Clerk of the Circuit Court issue an execution for the costs in this cause against the principal only?

"Question 2—Should I as Clerk of the Circuit Court issue an execution for the costs in this cause against the principal and sureties?

"Your attention is invited to the Quarterly Report of the Attorney General of Alabama for the period from April 1, 1936, Thru June 20, 1936, Volume 3, Page 137, and Title 7, Section 922, Code of Alabama of 1940."

Title 7, Section 923, Code of Alabama 1940, provides as follows:

"If the unsuccessful party, who has given bond and taken the property into possession, fails, for thirty days after the judgement, to deliver the property, and to pay the damages assessed for the detention thereof, and the costs, the sheriff must upon the bond make return of the fact of such failure; and thereupon the bond has the force and effect of the judgment, on which execution, garnishment or other process may issue against any or all the obligors therein for the alternative value of the property as assessed by the jury, and the damages assessed for its detention and the cost; if the property be delivered, and the damages assessed for its detention and the cost be not paid, the sheriff must upon the bond, make return of the fact, and execution, garnishment or other process must issue against any or all of the obligors for, such damages and costs, or for either as either may be unpaid."

"By statute it is made a supervision of the forthcoming bond that on breach of the condition, as evidenced by the officer's return, the court is authorized to render a summary judgement against the sureties on the bond." 26 C. J. S. Detinue, Section 24 at page 1291. Citing **Johnson v. Boulder,** 237 Ala. 325, 186 So. 715.

This is not a judgement against sureties, except to justify an execution. Such an execution against the principal is found on the judgment and forfeiture, but execution is against the sureties by virtue of their contract under the statue. The principal should discharge it. To see who the sureties are, the bond must be looked up, and upon it, not upon a judgment against them, the execution is issued against them. **Smith v. Jackson,** 56 Ala. 25, 28. It is not a personal judgment having the qualities of such against the sureties, and if it should be so held, the matter of due process would be involved. **Warren v. Ellis,** 227, Ala. 497, 150 So. 484. **Merrill v. Travis,** 248 Ala. 42, 26 So. (2nd) 258.

The duty of the sheriff to make known on the bond that the bond is forfeited, even though a ministerial duty, is a pre-requisite to putting the above statute into operation.

In order to authorize an execution on such bonds, it is necessary that they be drawn pursuant to the provisions of the Code relative to actions in detinue. **Rose v. Pearson, 41 Ala. 253.**

I am, therefore, of the opinion that if the bond is drawn pursuant to the provisions of the Code, and the sheriff makes known on the bond that the bond is forfeited, then a summary judgment should issue against the sureties on the bond for costs under Section 923, supra. If the conditions of this section are not fulfilled, then the sureties on the detinue bond became liable for costs by execution issued against them only after their liability has been judicially determined by suit on the detinue bond. **Quarterly Report of the Attorney General, Vol. 3, page 137.**

The copy of the bond you present is in Code form, as provided for in Title 13, Section 495, Code of Alabama 1940, but since there is nothing made known by the sheriff on the copy of the bond presented to evidence the forfeiture of the bond, and there is no summary judgement presented, then in the present status of the bond, execution must be issued against the principal only.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. Rose Huey

Deputy Clerk and Register

Jefferson County

Bessemer, Alabama

Clerks of Circuit Courts — Costs and Fees — Solicitor's Fees.

1. Costs and fees are accessable against a defendant in a criminal case only on conviction.

2. A solicitor's fee is not properly taxable as a part of the costs when a criminal case is ordered dismissed upon payment of costs by defendant, that portion of such order assessing costs and fees against the defendant being inoperative and void.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of July 17, 1951, is as follows:

"Section 85 of Title 11 Code of 1940 provides the following: 'Solititor's fees shall be taxed against the defendant on conviction,' etc.

"'State Auditors recently have advised me that I am required to collect Solicitor's fees as a part of the costs in criminal cases when the case is ordered dismissed upon payment of costs.

"Will you please advise me at an early date as to whether or not Solicitor's fees are properly taxable as a part of the costs when a criminal case is dismissed upon payment of costs?"

The answer to your inquiry is in the negative for the reason that costs and fees are assessable against a defendant in a criminal case only on his conviction. **Bilbro v. Drakeford,** 78 Ala. 318. There is no authority of law for taxing costs in the event the case against a defendant is nolle prossed or dismissed. **Melton v. State,** 30 Ala. App. 136, 1 So. 2d 920; Quarterly Report of Attorney General, Volume 54, page 118; Quarterly Report of Attorney General, Volume 6, page 156. You will note that in the case of **Melton v. State,** supra, specific mention is made of the solicitor's fee, it being there pointed out that such fee is assessable against a defendant in a criminal case only upon conviction of the defendant. Title 11, Section 85, Code of Alabama 1940.

The opinion in the **Melton** case, supra, by Justice Simpson, then a memmer of the Court of Appeals, being so apropos to your inquiry, I quote therefrom as follows:

"This purported judgement, we think, is totally void and inoperative. The law of costs and fees is penal and must be strictly construed. Cabler v. Mobile County, 230 Ala. 118, 119, 159 So. 692. Costs and fees can only be taxed when expressly provided by law. 1923 Code of Alabama. Section 3734; Bilbro v. Drakeford, 78 Ala. 318. There is no authority of law for such taxation of costs, the case against the defendant having been dismissed. Costs and fees are accessable against a defendant in a criminal case only on his conviction. Bilbro case, supra. Some sections of the Code, supra, each with this specific proviso, are listed: 3738, solicitor's fees; 3740, clerk's fees; 3750, sheriff's fees; 3755, preliminary proceedings; 3763, witness fees.

"The reason for our conclusion is otherwise obvious. The order of dismissal or nolle prosequi of the case is a judicial determination in favor of the defendant and against his conviction.

* * * * * * * * *

"It is observed that this practice has heretofore been denounced in opinions of the Attorney General of Alabama (Op., Attorney General, Office Edition, Vol. 4, p. 79, May to June, 1931; Op., Quarterly Rep., Vol. 6, p. 156-7, January to March, 1937). Although not binding here, these opinions are correct."

You are, therefore, advised that any order of nolle prosequi or dismissal predicted upon payment of costs by the defendant is inoperative and void, and that no costs or fees are properly assessable against the defendant thereunder. This, of course, includes the solicitor's fee to which you refer in your request for opinion. In specific answer to your inquiry, you are, therefore, advised that solicitor's fees are not properly taxable as a part of the costs when a criminal case is ordered dismissed upon payment of costs by the defendant, the portion of such order assessing costs and fees against the defendant being inoperative and void.

Very truly yours,

SI GARRETT

Attorney General

September 29, 1951

Hon. Walter F. Gaillard

Judge of Probate

Mobile County

Mobile 1, Alabama

Guardian and Ward — Veterans — Counties.

A person appointed as general guardian for a county may act as guardian for only five veterans under the Veteran's Guardianship Law (Title 21, Sections 160-176, Code of Alabama 1940), although such person may act for an unlimited number of other wards.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of August 23, 1951, is as follows:

"It will be appreciated if you will give me an opinion interpreting Title 21, Section 162, which provides in part, 'Except as hereinafter provided it shall be unlawful for any person to accept appointment as guardian for any ward if such proposed guardian shall at that time be acting as guardian for five wards.'

"During my term of office I have appointed a General Guardian for Mobile County, Alabama, who has duly qualified and is serving in such capacity. At the present time he is handling five guardianship matters, individually, and not under the veterans guardianship provisions of the 1940 Code of Alabama, Title 21, Section 160, et seq.

"You will note in reading the provisions of Section 162 that the only exceptions from this limitation apply to a bank or trust company acting for the ward's estate only, or an individual who may be acting as guardian for more than five wards if they are all members of the same family.

"After giving consideration to the matter I believe that your answer will be in the negative but, personally, hope that you will find some other provision of the Code which I have not been able to find which would authorize the General Guardian to accept and act in more than five veteran guardianships."

A general guardian for the county appointed by the judge of probate under the provisions of Title 21, Section 7, Code of Alabama 1940, may act as guardian when no other fit person applies for appointment and qualifies. There are no restrictions on the number of wards allowed a general guardian and he may therefore act for an unlimited number. However, the general guardian or any other person may only act as guardian for five veterans under the veterans' guardianship provisions, irrespective of the number of other wards represented or whether or not the guardian acts in an official capacity. Title 21, Section 162, Code of Alabama 1940. This section provides that it be unlawful for any person to accept appointment as guardian of any

ward if such proposed guardian shall at that time be acting as guardian for five wards. The only exceptions are in favor of banks or trust companies, or where the five wards are all members of the same family.

It should be noted, however, that the limitation required by Section 162 only applies to veterans. The term "ward" as used in Section 162 is defined in a preceding section to mean only beneficiaries of the United States Veterans' Bureau. Title 21, Section 160, Code of Alabama 1940.

It is my opinion that a person appointed as general guardian for a county may act as guardian for only five veterans under the Veteran's Guardianship Law, although such person may act for an unlimited number of other wards.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. Edgar Underwood

Judge of Probate

Franklin County

Russellville, Alabama

Counties — Franklin County — Publications — County Funds.

1. The provisions of Title 12, Section 22, Code of Alabama 1940, require the semi-annual publication in respect to all the funds of the county.

2. The maximum rate that can be paid from such publication in a county having a population of less than 40,000 is 1½c per word.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion bearing date of June 14, 1951, is as follows:

"Franklin County, Court of County Revenue, recently had published the financial statement of the county for the period beginning October 1, 1950, and ending March 31, 1951, which, at the rate of compensation for the publication stated in Section 22 of Title 12 for counties under 40,000 population, (this county being approximately 26,000) figures approximately $50.00 at one and one-half cents per word. The claim filed by the publisher is based on the amount of space that the financial statement occupied in the paper, that is, "132" financial statement, $83.16.

"Will you please advise me whether or not this claim can be paid by the County.

'Does said Section 22 of Title 12 of the Code apply to the publication of only the General Fund receipts and disbursements, and if so, could that part of the publication of the financial statement showing the receipts and disbursements of the road fund, or any and all funds other than the General Funds of the County, be contracted for on a space basis instead of on a word basis? In other words, could the publisher render his bill for the publication of that part of the financial statement applicable to the General Fund at one and one-half cents per word and another claim for the rest of the financial statement on the basis of the space it occupied and would the county be authorized to pay the claim in that form, the two items amounting to a total of $83.16.

"In the event you hold that said Section of the Code is applicable to only the General Funds of the County, should any other funds of the county be included in the financial statement?

"I would appreciate your advice in this matter at your earliest convenience, and oblige."

Title 12, Section 22, Code of Alabama 1940, provides as follows:

"The courts of county commissioners, boards of revenue or like governing bodies shall make a semi-annual publication on the first days of April and October of each year, in a newspaper published in the county, of an itemized report, showing the receipts and expenditures of money for the county, specifying particularly the sources from which received, and the purposes for which expended. Said publication must also show the entire indebtedness of the county, of whatever kind and character, specifying particularly the amount of bonds outstanding, their character and when due; the amount of the outstanding warrants, whether interest-bearing or not, and if interest-bearing, the rate of interest, for what said warrants were issued and when due and payable. The compensation to be paid for the publication herein provided for shall not exceed one and one-half cents per word, in counties of less than forty thousand population."

Under the provisions of this section the county governing body must make a full disclosure to the public twice each year of all expenditures and receipts of money. **Gray v. Johnson,** 235 Ala. 405 179 So. 221.

I am, therefore, of the opinion that a **full disclosure,** "specifying particularly the sources from which received, and the purposes for which expended" would include not only the general fund of the county but all funds of the county.

The monthly publication of the expenditures from the road and bridge fund required by Act No. 8, General and Local Acts 1949, page 23, would not relieve the county from including receipts and expenditures of the road and bridge fund in the semi-annual report required by Section 22, supra. It will be noted that Act No. 8, supra, requires publication of **expenditures** from the road and bridge fund, while Section 22, supra, requires publication of **receipts** and **expenditures** of said fund.

I am further of the opinion that under the provisions of Section 22, supra, the maximum that can be paid in Franklin County for this semi-annual publication is one and one-half cents per word; that such rate applies to the

publication in respect to all of the funds, and is not restricted to the publication in respect to the general fund.

Very truly yours,

SI GARRETT
Attorney General

September 29, 1951

Hon. J. H. Sims
Judge of Probate
Bullock County
Union Springs, Alabama

Counties — Leases.

When property rented by a county is no longer needed for county purposes, the county governing body may expend funds for making alterations and repairs on the property for the purpose of renting it.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of May 14, 1951, is as follows:

"The Commissioners' Court has been approached in behalf of some office space that is being used by the Price Marketing Association and the Soil Conservation Department. The County pays a very nominal rent for these rooms.

"Commissioners Court has been approached with the request for the rental of extra office space that is available provided Commissioners Court may make some improvements to include one extra room being provided. These improvements would be the building of two walls, wiring, and making three doors. Bids will be taken, and of course the work contracted by the lowest bidder. The landlord of this property does not wish to spend anything on repairs. An estimate of the improvements would be between $350.00 and $400.00.

"I would like your opinion as to whether the County could make these improvements as a legal expenditure.

"The agencies who would occupy the rooms are Federal Agencies. The F H. A. is anticipating moving into the office, if space is provided."

There is no doubt that the court of county commissioners can rent or lease additional office space in the event the courthouse is inadequate to supply offices for the officers entitled to space. Title 12, Section 12, Subsec-

tion 1, Code of Alabama 1940, as amended by Act No. 344, General Acts of Alabama 1945, page 560; Quarterly Report of Attorney General, Vol. 24, page 36; Biennial Report of Attorney General, 1936-38, page 251.

Furthermore, it is clear that the county governing body may rent or lease to private individuals, county property when it is no longer needed for county purposes. Quarterly Report of Attorney General, Vol. 60, page 106; **Corning v. Patton,** 236 Ala. 354, 182 So. 39; Quarterly Report of Attorney General, Vol. 48, page 7; Quarterly Report of Attorney General, Vol. 18, page 342. The nature, terms, price, etc. of a lease so entered into largely within the discretion of the county governing body; and in the absence of fraud and corruption or unfair dealings, its action in leasing property will not be disturbed. **Corning v. Patton,** supra; **Board of Revenue of Covington County v. Merrill,** 193 Ala. 521, 69 So. 971; **Jackson v. Ball,** 211 Ala. 273, 100 So. 327; **Weeks v. Bynum,** 158 Ala. 231, 48 So. 489; Quarterly Report of Attorney General, Vol. 22, page 145.

We have further held that the county governing body, under the provisions of Title 12, Section 178, Code of Alabama 1940, is authorized to repair county property. Quarterly Report of Attorney General, Vol. 47, page 17. In discharging this function that body is vested with a discretion which cannot be controlled by any judicial tribunal in the absence of fraud or unfair dealings. **Weeks v. Bynum,** supra.

It would be incongruous with the principle of good government and business to say that a county, which has acquired by lease additional office space, all of which is not now needed, could not in turn rent the excess space and thus recover some of its expenditures. If it is necessary to alter and repair the property in order to secure a tenant, good business practice would require that this be done.

I am of the opinion that there is ample authority in Section 12, Subsection 1, as amended, supra, and Section 178, supra, for court of county commissioners to make the improvements described in your request on the property rented by the county.

Very truly yours,

SI GARRETT

Attorney General

September 29, 1951

Hon. G. H. Howard

Judge of Probate

Elmore County

Wetumpka, Alabama

Counties — Roads and Bridges — Highways and Highway Department.

Under Section 5 of Act No. 329, General Acts 1943, page 311 (Farm to Market Road Act), as amended by Act No. 41, General Acts 1945,

page 47, a county may, by agreement with the Chief of Bureau of County Aid and with the approval of the Highway Director, set aside and use a lesser amount than one-half part of the state gasoline excise tax payable to itself monthly under Title 51, Section 655, Code of Alabama 1940.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion bearing date of May 25, 1951, is as follows:

"Pease give me your opinion on the following question:

"Is a County required by law to set aside one cent a gallon of its share of gasoline tax to match same amount furnished by the State Department for the purpose of construction of Farm to Market Roads, or may it set aside any 'lesser amount as agreed upon with the State Highway Department'?

"I venture to suggest that this question involves the construction of Acts of 1945, page 48, which appears in Title 23, Section 78 (6) as will appear in the supplement to the Code of 1940.

"It would appear that the language of the Act is plain to the effect that the limitation of one cent a gallon is a limitation in the sense that it is a ceiling, and that the County may appropriate a lesser amount if the governing body should determine.

"However, it has been contended otherwise, and I would therefore like to have your opinion on this question as early as possible."

An answer to your inquiry involves an interpretation of Section 5 of Act No. 329, General Acts 1943, page 311 (Farm to Market Road Act), as amended by Act No. 41, General Acts 1945, page 47. Section 5, as amended, supra, reads in pertinent part as follows:

"Any county to be eligible for aid under this Act must have a county engineer as provided by Code 1940, Title 12, Chapter 5, Sections 67-72, or any General or Local act under which a professional licensed engineer is employed and approved by the State Highway Department, must operate its county roads on a unit basis, and must also by resolution of its governing body agree to set aside and use only for such purpose one-half part of the State Gasoline Excise tax payable to itself monthly under Code 1940, Title 51, Section 655, as the same is paid to itself **or a lesser amount as may be agreed upon between the County and the Chief of the Bureau of County Aid, approved by the Highway Director.** All payments so made by the county shall be used or matched with an equal amount to be paid upon order of the State Highway Department out of the Public Road and Bridge Fund into the State County Aid Fund, as hereinabove provided, for the purpose of constructing county roads, upon approval of the application therefor and the plans and specifications thereof, as hereinabove provided; it being the intent of this Act that the State Highway Department and the county equally as nearly as practicable bear and pay the costs of such roads; provided, however, that not more than one sixty-

seventh part of the funds paid into the State County Aid fund by the Highway Department may be expended for matching county funds in any one county in any one fiscal year. The county may increase its contribution to such construction beyond the State's contribution but only with the approval of the Chief of the Bureau of County Aid. . . ."
(Emphasis supplies.)

As originally enacted in 1943, the first sentence of Section 5, supra, was as follows:

"Any county to be eligible for aid under this act must have a county engineer as provided by Code 1940, Title 12, Chapter 5, Sections 67-72, or any General or Local Act under which a professional licensed engineer is employed and approved by the State Highway Department must operate its county roads on a unit basis, and must also by resolution of its governing body agree to set aside and use only for such purpose **not less than** one-half part of the State Gasoline Excise Tax payable to itself monthly under Code 1940, Title 51, Section 655, as the same is paid to itself." (Emphasis supplied.)

As you will note, the 1945 amendment struck out the words "not less than" in Section 5, supra, and added the words "or a lesser amount as may be agreed upon between the County and the Chief of the Bureau of County Aid approved by the Highway Director."

It is clear from the foregoing legislative history that under the Farm to Market Road Act, as originally enacted in 1943, the county was required by law to set aside for Farm to Market roads one-half part of the State gasoline tax payable to itself. However, the 1945 amendment plainly does away with the mandatory feature so that a county may now, by agreement with the Chief of the Bureau of County Aid and with the approval of the Highway Director, set aside and use a lesser amount than one-half part of the State gasoline excise tax payable to itself monthly under Title 51, Section 655, Code of Alabama 1940.

I do not interpret the above cited statute as placing a ceiling on the county's contribution to Farm to Market roads. It is plain that the legislature intended for the county to have power to appropriate additional monies when it said in Section 5, as amended, supra, that "the county may increase its contribution to such construction beyond the state's contribution, but only with the approval of the Chief of Bureau of County Aid."

Very truly yours,

SI GARRETT

Attorney General

September 29, 1951

Hon. Carl W. Bear, Secretary
The Public Athletic Board of the
City of Montgomery, Inc.
P. O. Box 1149
Montgomery, Alabama

Municipalities — Taxation — Sales Tax.

A municipality or agency thereof engaged in the business of selling at retail tangible personal property subject to the provisions of the Alabama Sales Tax Law is required to collect the sales tax and remit the same to the State of Alabama as provided by law.

Opinion by Assistant Attorney General Livingston

Dear Sir:

Your request for an official opinion, bearing date of February 15, 1951, is as follows:

"Re: Liability Of The Public Athletic Board of the City of Montgomery, Inc., For Payment of Alabama Sales Tax.

"The Public Athletic Board of the City of Montgomery is a public corporation organized for the purpose of owning and operating athletic and recreation facilities in the City of Montgomery, Alabama, said corporation having been organized under the Provisions of General Act 231, General Acts of Alabama 1947, Page 94, et seq.

"The Public Athletic Board of the City of Montgomery, Inc operates the facilities known as Cramton Bowl and Municipal Stadium. In the operation of these facilities, The Public Athletic Board makes a charge to the various institutions and parties using these facilities of ten per cent of its admission charges. The Public Athletic Board retains all concessions and has seasonal employees who peddle soft drinks, peanuts, popcorn, etc.

"The State Department of Revenue claims that The Public Athletic Board is accountable to the State of Alabama for a sales tax on all concession merchandise sold by The Public Athletic Board. It is the belief of The Public Athletic Board that it is specifically exempted from such taxation and it is respectfully requested that you render an opinion as to whether or not The Public Athletic Board of the City of Montgomery is liable for such tax."

It is my opinion that The Public Athletic Board of the City of Montgomery, Inc., must collect and pay to the State of Alabama sales tax on sales made through concessions operated by it, which tax is levied by Title 51, Section 753, Code of Alabama 1940, as amended by Act No. 121, General Acts 1951, approved June 22, 1951 (Ms.)

There can be no question that The Public Athletic Board of the City of Montgomery, Inc., which was incorporated in accordance with the provisions

of Act No. 231, General Acts 1947, page 94, is an agency of the City of Montgomery, an incorporated municipality.

As a general proposition, it would seem that when municipalities become competitors with private enterprise they should be treated no better than others operating in the same field. **City of Phenix v. State ex rel Conway, Attorney General,** 85 Pac. (2d) 56.

Section 753, as amended, supra, provides, in part, as follows:

"§ 753. Tax levied on gross receipts.—There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by application of rates against gross sales, or gross receipts, as the case may be, as follows: (a) Upon every person, firm or corporation engaged or continuing within this state, in business of selling at retail any tangible personal property whatsoever, including merchandise and comodities of every kind and character, (not including, however, bond or other evidences of debts or stocks), an amount equal to three percent of the gross proceeds of sales of the business except where a different amount is expressly provided herein. * * *."

The word "person" as used in Section 753, supra, is defined in Title 51, Section 752, Code of Alabama 1940, as amended by Act No. 305, General Acts 1947, page 160, as follows:

"§ 752. Definitions.—(1) The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning: (a) The term 'person' or the term 'company' herein used interchangeably, includes any individual, firm, co-partnership, association, corporation, receiver, trustee or any other group or combination acting as a unit and the plural as well as the singular number, unless the intension to give a more limited meaning is disclosed by the context. * * *"

It is to be noted that municipalities or agencies thereof are not specifically included in the above definition of the term "person." In view of this, it may be argued that the Legislature did not intend that a municipality, as a vendor, be subject to the provisions of the Sales Tax Law. It is a general proposition of law that when a tax levy is laid in general terms with nothing to indicate that it was intended to apply to a county or a municipality or an agency thereof, it will be held not so to apply. **State v. City of Montgomery,** 228 Ala. 93, 151 So. 856; **City of Birmingham v. State,** 233 Ala. 138, 170 So. 64. This general rule of construction is court made and is rested upon the assumption that there was no legislative intent that a county or municipality levy a tax to pay a tax. **Long v. Roberts and Son,** 234 Ala. 570, 176 So. 213. However, while the Alabama sales tax, by the provisions of Section 753, as amended, supra, is levied upon the seller, our Supreme Court, in view of the mandatory provisions of Title 51, Section 776, Code of Alabama 1940, now amended by Act No. 525, General Acts 1951, approved August 23, 1951 (Ms.), has construed the sales tax to be a "consumer's tax." Section 776, as amended, supra, provides as follows:

"Section 776. Tax bracketed; to be added to purchase price; refund unlawful; penalty.—Every person, firm, corporation, association, or co-partnership engaged in or continuing within this state in the business for which a license or privilege tax is required by this article shall add to the sales price and collect from the purchaser on all sales upon the

gross receipts or gross proceeds of which there is levied by this article a sales tax at the rate of three (3) per cent, three cents tax for each whole dollar of sales price. Provided, however, on that part of the sales price which is a fractional part of a dollar, in addition to whole dollars, and on sales of less than a dollar there shall be collected in addition to the tax collected on whole dollars, no tax on one cent to and including ten ,cents of sales price; one cent tax on eleven cents to and including forty cents of sales price; two cents tax on forty-one cents to and including seventy-five cents of sales price; three cents tax on seventy-six cents to and including ninety-nine-cents of sales price. Provided further, that upon all sales the gross receipts or gross proceeds of which are taxed by this article at the rate of one per cent, there shall be added to the sales price and collected from the purchaser by such person, firm, corporation, association, or co-partnership described in this section an amount equal to one per cent of such sale price. It shall be unlawful for any person, firm, corporation, association, or co-partnership described in this section to fail or refuse to add to the sales price and collect from the purchaser the amount required by this section to be added to the sales price and collected from the purchaser; and it shall likewise be unlawful to refund or offer to refund all or any part of the amount collected, or to absorb or advertise directly or indirectly the absorption or refund of the amount required to be added to the sales price and collected from the purchaser; or any portion of such amount. Any person, firm, corporation, association, or co-partnership violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than fifty dollars nor more than one hundred dollars, or may be imprisoned in the county jail for not more than six months or by both such fine and imprisonment and each act in violation of the provisions of this article shall constitute a separate offense. The provisions of this section that there shall be added to the sales price and collected from the purchaser the amounts provided herein shall in no way relieve the person, firm, corporation, association, or co-partnership described in this section of the tax levied by this article; nor shall the inability, impracticability, refusal, or failure to add to the sales price and collect from the purchaser the amounts provided herein relieve such person, firm, corporation, association, or co-partnership from the tax levied by this article."

The sales tax imposed not by Section 753, as amended, supra, alone, but by the Act in its entirety, and all sections of the Sales Tax Law are to be construed **in pari materia** to determine the legislative intent. In the case of **Lone Star Cement Corporation v. State Tax Commission,** 234 Ala. 465, 175 So. 399, the Court stated:

"The tax imposed, not by said Section 2, standing alone, but by the Act, and to ascertain the legislative intent, the Act is to be considered as a whole in the light of existing facts and conditions, known to all men, and, of which courts take judicial notice.
* * .

"The purchasers in these classes are the ultimate consumers and the legislative intent is to make the sale to the consumer the basis for computing the tax. State v. Christhilf, 170 Md. 586, 185 A. 456.

"In truth and in fact the tax can well be denominated a consumer's tax. * * *."

See also the cases of **Doby, et al, v. State Tax Commission,** 234 Ala. 150, 174 So. 233; **Tanner v. State,** 28 Ala. App. 568, 190 So. 292; **State v. Woods,** 242 Ala. 184, 5 So. 2d 732.

In commenting on the general rule of construction referred to above, the Court in the case of **Long v. Roberts and Son,** supra, stated:

"The rule of exemption is court made, rested upon assumption there was no legislative intent to levy a tax to pay a tax. * * *

"True, in the strict and proper sense the tax is on the seller, and he is properly in such a sense to be denoted as the taxpayer. Doby's Case, supra.

"But we are dealing with a broad principal relating to governmental functions. and should look through form to substance. And when this is done, the act clearly demonstrates that the burden of the tax is expressly placed upon the consumer, and it is this burden with which the broad principle of exemption has to deal. * * *

"True, in the Doby Case, supra, it was expressly stated the seller is the taxpayer, for he it is who is required to take out the license, make the returns, keep the records, and pay the tax to the State Tax Commission. But in the same opinion section 24 of the act is quoted, in which it is declared unlawful for the seller to fail or refuse to add to the sales price and collect from the purchaser the amount due on account of the tax or in any manner to absorb the tax, and added the conclusion that 'the ultimate burden of the tax is thus passed on to the consumer.' Further consideration of this question is therefore unnecessary.

"While theoretically the tax is on the seller, yet in actuality the burden of the tax falls on the consumer. ***."

In view of the above, the general rule of construction commented on in **Long v. Roberts and Son,** supra, has no field of operation where the burden of the sales tax is passed on to and the tax is collected from the purchaser. No tax has to be levied to pay a tax, for the tax is collected from the purchaser.

Since, from the above it is clear that the Alabama sales tax is a consumer's tax, and the burden of the tax is on the purchaser, construing the Alabama Sales Tax Act as a whole, and looking through form to substance, the sales tax is not a tax on The Public Athletic Board of the City of Montgomery, Inc., but rather a tax on the purchasers therefrom of tangible personal property. The Board, through its concessions, is merely a collecting agency for the State, and is required by law to collect the sales tax and remit it to the State of Alabama. The duty of collecting the tax and remitting the same to the State exists even though the seller is an instrumentality of the City of Montgomery, for the tax is not on the instrumentality but on the purchaser or consumer.

This conclusion finds support in the opinion of the United States Supreme Court in the case of **Colorado National Bank of Denver v. Bedford,** 310 U. S. 41, 60 S. Ct. 800. The Colorado National Bank operated a safe deposit service. The Public Revenue Service Tax Act of Colorado, in Section 5 (c), imposes a tax equivalent to two per cent of the value of the services rendered by "banks, finance companies, trust companies, and depositories." The person rendering the services "shall be liable and responsible for the payment of the entire amount." Under Section 6 of the Act, such person is required to remit to the Treasurer all taxes collected and due the State, less three per cent to cover the expense of the service. Under Section 6 (b) persons rendering or performing the services are required "as far as practicable to add the tax imposed * * * to the value of services or charges showing such tax as a separate and

distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts." By Subsection (d) the person rendering the service is forbidden to hold out directly or indirectly that he will assume or absorb the tax. In holding the bank liable for the tax imposed, the court states:

> "We may assume, as did the Supreme Court of Colorado, that the tax is invalid, if laid upon the bank as an instrumentality of government in the incidents referred to in the preceding section; and that its banking operations are free from state taxation except as Congress may permit; that Congress permits the taxation only of shares and real estate, and that Congress may intervene to protect its instrumentalities from any other tax which threatens their usefulness.
>
> "Congress has not legislated against taxation of the customers of national banks. This court has approved a tax assessed upon the deposits of customers of national banks. By section 6 of the Colorado act the 'person rendering or performing services shall be liable' for the payment of the tax imposed. But as subsection (b) of that same section requires the tax paid to be added to the charges for service 'as separate and distinct item' and makes it a debt from the user of the services until paid, the tax is upon the user of the sale deposit boxes, not upon the bank. Furthermore, as by section 2 (h) credit is given to the bank for taxes paid on accounts subsequently found worthless and the bank is in a position to require payment of box rentals and taxes in advance, there is no occasion for a bank ever to have saddled upon it any part of the tax burden. * * *
>
> "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank. The Colorado Supreme Court holds the user is the taxpayer. The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by section 12 of the act as the responsible obligor, we conclude the tax is upon him and not upon the bank. The Constitution or laws of the United States do not forbid such a tax.
>
> "The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a federal instrumentality. Especially is this true since the bank under the Colorado act is allowed three per cent of the tax for the financial burden put upon it by the obligation to collect."

By the authority granted in Title 51, Section 785, Code of Alabama 1940, as amended by Act No. 550, General Acts 1951, approved August 28, 1951 (Ms.), a discount not to exceed 5% of the first one hundred dollars of taxes levied and 2% of the taxes levied over one hundred dollars is allowed when returns are timely filed.

A similar question arose in the case of **Allen v. Regents of University System,** 304 U. S. 439 S. Ct. 980. In this case the respondent was a public corporation, created by Georgia as an instrumentality of the state, having control and management of the University of Georgia and the Georgia School of Technology. The question was as to whether the respondent was immune

from paying the Federal admissions tax in respect to athletic contests in which teams representing colleges conducted by the respondent participated. In denying such immunity, the court said:

"For present purposes we assume the truth of the following propositions put forward by the respondent: That is a public instrumentality of the state government carrying out a part of the State's program of public education; that public education is a governmental function; that the holding of athletic contests is an integral part of the program of public education conducted by Georgia; that the means by which the state carries out that program are for determination by the state authorities, and their determination is not subject to review by any branch of the Federal Government; that a state activity does not cease to be governmental because it produces some income; that the tax is imposed directly on the state activity and directly burdens that activity; that the burden of collecting the tax is placed immediately on a state agency. The petitioner stoutly combats many of these propositions. We have no occasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return, and pay it to the United States. * * * It is evident that these exhibition enterprises are comparatively large and are the means of procuring substantial aid for the schools' programs of athletics and physical education. In final analysis the question we must decide is whether, by electing to support a governmental activity through the conduct of a business comparable in all essentials to those usually conducted by private owners, a state may withdraw the business from the field of Federal taxation.

"When a state embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render the activity immune from federal taxation. In South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110, 50 L Ed. 261, 4 Ann. Cas. 737, it appeared that South Carolina had established dispensaries for the sale of liquor and prohibited sale by other than official dispensers. It was held that the United States could require the dispensers to take licenses and to pay license taxes under the internal revenue laws applicable to dealers in intoxicating liquors, and this notwithstanding the State had established the dispensary system in the valid exercise of her police power. In Ohio v Helvering, 292 U. S. 360, 54 Ct. 725, 78 L. Ed. 1307, it was shown that Ohio, in the exercise of the same power had created a monopoly of the distribution and sale of intoxicating liquors through stores owned, managed, and controlled exclusively by the State. It was sought to enjoin the Commissioner of Internal Revenue and his subordinates from enforcing against the State, her officers, agents, and employees, penalties for the nonpayment of federal exercises on the sale of liquor. Relief was denied and the views expressed in the South Carolina Case were reaffirmed. In Helvering v. Powers, 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291, the court found that Massachusetts, in the exercise of the police power, had appointed a board of trustees to operate a street railway company's properties for a limited time. It was held that, though the trustees were State officers, their salaries were subject to federal income tax because the State could not withdraw sources of revenue from the federal taxing power by engaging in a business which went beyond usual governmental functions and to which, by reason of its nature, the federal taxing power would normally extend . . . . . .

"There is no reason why the State of Georgia should risk or ask its agents to risk penalties to determine whether this tax is collectible. Respondents would lose nothing by collecting the tax and turning it over to the United States. If they desire to stand upon their own conception

of the law and refuse to collect the tax, they must take the risks of such action. Every other taxpayer or collector of admission taxes must make the same choice."

See also case of **State of New York v. United States,** 326 U. S. 572, 66 S. Ct. 310.

Title 51, Section 755 (b), Code of Alabama 1940, as amended by Act No. 211, General and Local Acts 1949, page 302, specifically provides that "the gross proceeds of sales of tangible personal property * * * to incorporated municipalities of the State of Alabama * * * are exempt from the sales tax. It is to be noted from the above-quoted part of Section 755 (b) that only sales **to** an incorporated municipality are exempt. There is no provision in the Sales Tax Law which exempts therefrom sales made **by** a municipality or any agency thereof.

The provision of Section 776, as amended, supra, "no tax on one cent to and including ten cents of sales price," is of no consequence where a vendor also makes sales in an amount greater than 10 cents. The so-called "bracket system" is designed so that a vendor will, on his total sales, collect no less than the 3 percent required. In fact, experience has demonstrated that the taxes required to be exacted, though regulated to avoid fractions of cents, may even afford a slight profit. See **Jewel Tea Co. v. State Tax Commission,** 293 N. W. 386 (N. D.). It should be noted here that where a vendor sells two or more items subject to the sales tax to the same person as on purchase, the purchase price of each item being 10 cents or less but the total purchase price of all items being in excess of 10 cents, the proper amount of tax based on the total purchase price should be collected. For example, if two 10 cent items are purchased by the same person as one purchase, a tax in the amount of 1 cent is to be collected.

There is no exemption to the vendor from the sales tax on sales of 10 cents or less, and the Alabama Supreme Court has held that a vendor making such sales is liable for the sales tax. **State v Woods,** 242 Ala. 184, 5 So. 2d 732; **Birmingham Vending Co. v. State,** 251 Ala. 584, 38 So. 2d 876; **State v. Baker's Ice Cream Service,** 254 Ala. 311, 48 So. 2d 230. In **State v. Woods,** supra, the court states:

"The harmonious construction of these statutes is to the effect that all persons engaged in the business of selling at retail tangible personal property (not expressly exempt) are subject to such tax even though the seller fails or is unable to collect the amount of such tax from the purchaser under the provisions of the sales tax law. The foregoing illustrated by many decisions in this and other jurisdictions. Doby v. State Tax Commission, 234 Ala. 150, 174 So. 233; Southern R. R. v. Curry, 239 Ala. 263, 194 So. 523; Tanner v. State, supra; Code 1940, T. 51, §§ 753, 754, 756-762. The tax is due and collectible. General authorities that are pertinent are: Queens Vending Machine Corp. v. City of New York, 246 App. Div. 594, 284 N. Y. S. 801; Matter of Atlas Television Co., 273 N. Y. 51, 6 N. E. 2d 94; Jensen Candy Company. v. State Tax Comm., 90 Utah 359, 61 P. 2d 629, 107 A. L. R. 261; Roth Drugs v. Johnson, 13 Cal. App. 2d 720, 57 P. 2d 1022; Mouledoux v. Maestri, 197 La. 525, 2 So. 2d 11; Wilson v. City of Philadelphia, 330 Pa. 350, 198 A. 893.

"In 110 A.L.R. 1488, 1489, it is said: 'Where the statute does not exempt sales on which the tax would be less than 1 cent, and as a result the seller finds it impossible or impracticable to collect the tax from the purchaser, the question arises as to whether the tax lacks such uniformity as to violate constitutional requirements or equality under the laws of uniformity

of taxation. In stores in which the sales are normally for 5 or 10 cents, this becomes a serious problem under the usual tax rate of 1 or 2 per cent, because the tax is so small that there is no legal tender with which the purchaser can pay it, and he rightly refuses to pay a full cent as tax, since that sum may by comparison greatly exceed the actual tax. Yet if the seller bears the burden of the tax on all these transactions, his loss mounts steadily with the volume of such sales. The courts, however, have uniformly sustained the sales tax notwithstanding this objection, saying that by "breakdown" schedules or other means the seller can pass the tax on to the consumer. Roth Drugs v. Johnson, 1936, 13 Cal. App. App. 2d 720, 57 P. 2d 1022, W. F. Jensen Candy Co. v. State Tax Commission, 1936, 90 Utah 359, 61 P. 2d 629, 107 A. L. R. 261; State Tax Commission v. Logan, 1936, 88 Utah 406, 54 P. 2d 1197. As to computation of sales tax, see annotation in 107 A. L. R. 267 (License, §77).' To like effect are decisions cited in 117 A. L. R. 846, 849."

See also the case of **DeAryan v. Akers,** 12 Cal. (2d) 781, 87 Pac. (2d) 695.

Section 11 of Act No. 231, supra, under which The Public Athletic Board of the City of Montgomery, Inc., was incorporated, provides as follows:

"Section 11. Exemption from taxation. The corporation and all facilities at any time owned by it and the income therefrom, and all bonds issued by it and the income therefrom, shall be exempt from all taxation in the State of Alabama."

Since the sales tax with reference to the sales made by the board is not, as pointed out above, a tax on the board or its income, the above-quoted exemption provision has no application to the tax in question.

It is, therefore, my opinion that The Public Athletic Board of the City of Montgomery, Inc., is required to collect the sales tax on sales made through its concessions and remit the same to the State of Alabama as provided by law.

Very truly yours,

SI GARRETT

Attorney General

September 29, 1951

Hon. Walter F. Gaillard

Judge of Probate

Mobile County

P. O. Box 7

Mobile 1, Alabama

Insane Person — Judges of Probate — Alabama Insane Hospital — Counties.

Since the state has the power to commit to an asylum non-resident lunatics found within the state, even though such persons are

domiciled outside this State, the terms "resides" and "resident," as used in Title 45, Sections 208 and 210, Code of Alabama 1940, should not be construed as used synonymously with the term "domicile".

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of August 10, 1951, is as follows:

"There is some question in my mind as to whether or not an insane person who resides in Mobile County may be committed to the Alabama State Hospitals if a change of domicile may not have been effectuated through lack of mental capacity to form an intent to acquire a new domicile.

"Specifically, if a parent, or child, or an adult insane person who maintains and supports such insane person, moves to and establishes a bona fide residence within the State of Alabama, the custody of the insane person remaining with such next of kin, is the insane person a **resident** of the State of Alabama within the meaning of Sections 208 and 210 of the 1940 Code of Alabama? It is to be assumed that the non compos had no lucid intervals within which time to form the intent to abandon the domicile of his origin and acquire a new domicile.

"The answer to this inquiry would seem to depend upon whether, in a proceeding such as this, the word 'residence' should be used synonymously with the word domicile.'"

I am of the opinion that your question should be answered in the affirmative.

Title 45, Section 208, Code of Alabama 1940, describes generally the procedure to be followed in making application to the judge of probate for admission of a patient to one of the state hospitals for the insane. In part it provides that:

"When a relative, friend, or other party interested desires to place a person as a patient in one of the state hospitals, he shall apply to the judge of probate of the county in which the person **resides.** . . ." (Emphasis supplied).

Title 45, Section 210, Code of Alabama 1940, describes generally the form and contents of the certificates of the judge of probate for admission of a patient to such hospitals. The said certificate requires the judge of probate to certify, in part, that the patient is "a resident of this county."

Title 45, Section 45, Section 221, Code of Alabama 1940, provides that, in the absence of proper commitment papers from the judge of probate, a justice of the peace may issue such papers for a patient's admission to the Searcy Hospital at Mount Vernon. This section, in referring to the patient, speaks, also, of "the county in which he resides."

An adult person who has become a mental imbecile, or who has been judicially declared insane, is incapable of a voluntary change of domicile, and therefore retains the domicile which he had when he became insane. Being

without mental capacity, such a person is unable to exercise either choice or intention, which are twin elements essential to a change of domicile. 17 Am. Jur., Domicile, Section 70, page 632; 28 C. J. S., Domicile, Section 12, page 27, 19 C. J. Domicile, Section 37, page 417-418; 30 A. L. R. 607, et seq., note citing numerous authorities.

While generally recognized that a guardian trustee, or committee has the power to change the mere municipal domicile of his insane ward, there is no such unanimity of opinion on the question of the power of a guardian, trustee, or committee to change his ward's domicile from one state to another state. Recognizing the division of opinion, 17 Am. Jur., Domicile, Section 71, pages 632-633, states that, "The majority of the decisions, however, are to the effect that the guardian, turstee, or committee have no power, by virtue of the office, on their own motion, to change the domicile of an insane ward who is incapable of acting for himself from one state or country to another. . ." The Supreme Court of this State has said that, "It is settled in this court that a guardian cannot change the domicile taken by his ward at the place of his birth, or acquired from the father at his death. **"Daniel & Wife v. Hill & Wife,** 52 Ala. 430.

Your question is based upon the premise that the adult insane person was **non compos mentis** at the time he was moved into, or was brought to the State of Alabama; and, since his residence in this state, he has had no lucid intervals within which he was capable of forming the intent to abandon his former domicile. From the foregoing discussion it is seen that such person, while continuing in such mental condition, is incapable of acquiring a domicile in this state, despite the fact that he is in custody of a relative, guardian, trustee, or committee and is here physically present.

The distinction between "domicile" and "residence" is one long recognized. It is said that a person may and must have only one domicile, but may have several residences. A person's domicile is the place with which he has a settled connection for legal purposes, either because his permanent home is there or because it is assigned him by law. On the other hand, his residence may or may not be identical with his domicile, since residence is a mere factual place of abode. See 1 Beale on Conflict of Laws, Domicile, Section 10.3, page 109, et seq., (1935 Ed.)

The terms "domicile" and "residence," as used in statutes, are generally used interchangeably and are commonly construed as synonymous. This general rule of construction is, however, subject to numerous and important qualifications. Whether the two terms are to be construed as used synonymously depends upon the purpose of the statute and context in which the terms are used. See 28 C. J. S., Domicile, Section 2, page 7; 17 Am. Jur., Domicile, Section 9, page 593.

Courts of probate of this state are vested with original, exclusive, and general jurisdiction over persons of unsound mind, and over the appointment and removal of their guardians. See Title 21, Sections 9-25, Code of Alabama 1940, as amended. As hereinabove seen, such courts also have jurisdiction over the commitment of insane persons to the state hospitals for the insane. Sections 208 and 210, supra. Since insanity is a disease, hurtful in its possible consequences to both the patient himself and the public at large, under its police power a state has the right to treat one within its borders who is suffering from the disease of insanity. The power is not restricted to resident lunatics, but applies with equal force to non-resident lunatics within the state. **In the matter of Ganse, a lunatic,** 9 paige (N. Y.) 416; **Chaloner v. Sherman;** (C. C. A. - 2d) 215 Fed. 867; **Emmerich v. Thorley,** 35 App. Div. 452, 54 N. Y. S. 791; **In re Crosswell's Petition,** 28 R. I. 137, 66 Atl. 55, 13 Ann. Cas. 874; Shea

v. Gehan, 70 Ga. App. 229, 28 S. E. (2d) 181; **Anderson v. Smith,** (Ga. App.) 45 So. (2d) 282; 44 C. J. S., Insane Persons, Section 64, pages 161-162; 32 C. J. Insane Persons, Section 344, page 678.

In his opinion deciding the case of **In the Matter of Ganse, a lunatic,** supra, Chancellor Walworth states that:

". . .It was at one time questioned whether the lord chancellor of England could issue a commission where the lunatic was abroad. But since the decision of Lord Hardwicke, in Southcot's case, (2 Ves. sen. 402,) there can be no doubt of the right of the chancellor to issue a commission, where the lunatic is himself domiciled abroad. And the cases of Perkins, (2 John. Ch. Rep. 124,) and Petit, (2 Paige's Rep. 174) establish the same principle here. Stock, in his treatise upon the law of non compos mentis, says 'All persons permanently non compos mentis are proper objects of a commission of lunacy, provided they are natives of or residents in England. Thus a commission may be granted against a foreigner whilst in this country, or against an Englishman whilst out of it.' (Stock's Non Compos Mentis, 94.). . .

Therefore, it is my opinion that the words "resides" and "resident," as used in Sections 208 and 210, supra, should not be construed as used synonymously with the word "domicile," for the purpose of committing to an asylum an insane person residing within the borders of this State. **Shea v. Gehan,** supra. Cf. Quarterly Report of Attorney General, Vol. 24, page 196.

Very truly yours,

SI GARRETT

Attorney General

September 29, 1951

Hon. J. P. Shaffer, Clerk

Montgomery County Board of Revenue

Montgomery, Alabama

Counties — Funds — Appropriations — Opinions Overruled.

1. A county governing body may appropriate county funds to a chamber of commerce for the purpose of promoting the industrial development of the county.

2. A county governing body may pledge to or contract with a chamber of commerce for the payment of county funds to the chamber of commerce each year for a period of five years for the purpose of promoting the industrial development of the county, even though said contract or pledge extends beyond the terms of the members of the county governing body.

3. An appropriation by the county governing body to a chamber of commerce for the purpose of promoting the industrial development of the county does not violate Section 94 of the Constitution of Alabama 1901.

4. Quarterly Report of Attorney General, Vol. 35, page 84, overruled.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of May 25, 1951, as as follows:

"The Montgomery County Board of Revenue is interested in participating in a program, sponsored by the Montgomery Chamber of Commerce, for bringing new industries to Montgomery County and otherwise promoting the industrial development of the county. The program is to extend over a period of five years and the Board of Revenue is desirous of pledging $25,000 to the program, $5,000.00 each year for the next five years.

"The terms of office of the members of the present Board expire in two years.

"Can this Board legally make such a pledge that will be binding for the five-year period?"

I am of the opinion that your inquiry should be answered in the affirmative.

On June 13, 1944, this office rendered an opinion holding that a county governing body was without authority to appropriate county funds to chambers of commerce, for the reason that such an appropriation would violate Section 94 of the Constitution of Alabama 1901, which provides, in part, as follows:

"The legislature shall not have power to authorize any county ..... of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever,....."

Quarterly Report of Attorney General, Vol. 35, page 84. This opinion further held that an appropriation by a county governing body to a chamber of commerce is unauthorized because such appropriation involved an unreasonable delegation of authority by the county to a chamber of commerce. It was further decided that if the appropriation by the county to a chamber of commerce places the sole control over the appropriated funds in the chamber of commerce, inasmuch as the Examiners of Public Accounts are not authorized to audit the expenditures of the chamber of commerce, said appropriation should not be made. This opinion recognized the fact that the chamber of commerce performs a valuable service to the community and to the State by working to develop, advertise, and promote all the resources of the State. See also Quarterly Report of Attorney General, Vol. 35, page 7.

Since this opinion was rendered, Title 12, Section 12, subsection 22, Code of Alabama 1940, was amended by Act No. 344, General Acts 1945, page 560, to read as follows:

"The Court has authority:. . . . . .22. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing

plants, factories and other industries in their respective counties. The court is authorized to enter into contracts with any person, firm, corporation or association to carry out the purposes set forth in this subdivision."

The last sentence in the above-quoted subsection was added by the amendment. No doubt, this sentence was added because of the opinion of the Attorney General of June 13, 1944, supra.

If the opinion of June 13, 1944, supra, is correct, the amendment included in Act No. 344, supra, would be ineffective, for the reason that even though the Legislature attempted to give the county authority to enter into contracts to carry out the purposes set forth in subsection 22, supra, the county would still be without the power to contribute its funds to a private association because the Constitution forbids such an appropriation. Constitution of Alabama 1901, Section 94; **Stone v. State,** 223 Ala. 426, 136 So. 727.

Upon a reconsideration of the question, it is my conclusion that the opinion of this office rendered June 13, 1944, supra, is in error and should be overruled.

It is recognized that a municipal corporation may engage in the advertisement and promotion of the community when so authorized by the Legislature. 37 Am. Jur., Municipal Corporations, Section 127, page 740. See also 79 A.L.R. 466. Clearly, the Legislature, by amending subsection 22, supra, attempted to authorize the county governing body to use county funds for promoting and advertising the county, and for bringing new industries into the cities and the county.

The opinion rendered June 13, 1944, supra, was based upon the case of **Stone v. State,** supra, where it was held that a contract made by the county with the broadcasting corporation was invalid, for the reason that the primary purpose of the contract was not to advertise the county, but to induce the promoters of the radio station to establish it in the city of Mobile. Although such contract was held invalid, the court was careful to point out that the county was free to negotiate a contract with an established media of advertising, such as the big daily newspapers of the State, without violating Section 94 of the Constitution. This is true even though the advertising medium was an association or corporation receiving financial benefit from the county. It is pointed out in **Stone v. State:**

".....that the cause giving birth to this section of the Constitution was the recognized fact that 'the trustees of government are and have always been amendable to' the subtle influence of anticipating that by establishing and promoting a new industry or institution in a community, though established for private gain, it brings to the community where established, some public benefits, and that such influence encourages the improvident expenditure of public money and the incuring of governmental liabilities that must be taken care of by taxation. No such influence could or would be present in negotiating a contract with an established medium of advertising, and the trustees of the government in negotiating and entering into such contract would be aided by competition, and deal at arm's length with only the benefit that would result from such advertising in view."

I am of the opinion that a chamber of commerce is not in business to make a profit for itself and is not a business enterprise. This organization is concerned with promoting trade and commerce, but an organization derives no profits from increased trade or business even though its individual members may do so.

Since the opinion rendered June 13, 1944, this office has, on numerous occasions decided that counties may donate funds to nonprofit organizations when a public purpose is involved, without violating Section 94 of the Constitution. When the purpose to be accomplished is of a public nature and is enumerated in our statutes, and particularly Title 12, Section 12, Code of Alabama 1940, as amended, supra, as a function of the county or a purpose for which county funds may be expended, we have uniformly held that such expenditures are authorized. This office has held that the county may donate funds to the following: Alabama-Coosa Rivers Improvement Association, Quarterly Report of Attorney General, Vol. 55, page 110; Piedmont Livestock Show Barn and Youth Center, Inc., Quarterly Report of Attorney General, Vol. 53, page 185; Cattle Show and Fair Association, which was a nonprofit association, Quarterly Report of Attorney General, Vol. 51, page 151; Artificial Breeding Association, Quarterly Report of Attorney General, Vol. 49, page 86; and to the Cancer Control Program, Quarterly Report of Attorney General, Vol. 47, page 76.

I am of the opinion, therefore, that the opinion rendered by this office on June 13, 1944, Quarterly Report of Attorney General, Vol. 35, page 85, is in error, and is hereby overruled. I further hold that the county is not prohibited by Section 94 of the Constitution from donating or contributing funds to a chamber of commerce in a program designed to bring new industries into the county; and, further, that by reason of the amendment to subsection 22, supra, a contract, agreement, or pledge may be made by the county with or to a chamber of commerce to carry out the purposes enumerated in subsection 22, as amended, supra.

It is further my opinion that the present members of the Montgomery County Board of Revenue may, in their discretion, pledge or promise to contribute $5,000 each year to the Montgomery Chamber of Commerce for a period of five years, even though the period will extend beyond the expiration of the terms of the present members of the board.

The general rule is that a county, acting through its governing body, may legally bind its successors by a contract when there is no fraud or an attempt to tie the hands of the succeeding board. **Corning v. Patton,** 236 Ala. 354, 182 So. 39, **Willett & Willett v. Calhoun County,** 217 Ala. 687, 117 So. 311; 20 C.J.S., Counties, Section 176, page 1009; 14 Am. Jur., Counties, Section 41, page 210.

There are no facts stated in your inquiry that would lead me to believe that a pledge to the Montgomery Chamber of Commerce covering a five year period would seriously tie the hands of the succeeding members of the Montgomery County Board of Revenue.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. W. J. Terry

State Superintendent of Education

State of Alabama

Montgomery 4, Alabama

Schools — Teachers.

Teachers, instructors, principals, supervisors, and other faculty members employed by state regional vocational and trade schools are not covered by the provisions of the Teacher Tenure Law of 1939.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of June 1, 1951, is as follows:

"There are either in existence or plans definitely made for the establishment of five trade schools in Alabama. These schools are directly under the State Board of Education. Until recently, we have had only one trade school; namely, the Alabama School of Trades, Gadsden.

"It now becomes necessary for us to determine the status of instructors in these schools as it relates to Alabama's Tenure Law. My question is this: Whether or not instructors and other personnel in the State trade schools are covered under the Tenure Law?"

In my opinion your question must be answered in the negative.

The Teacher Tenure Law of 1939 defines the term "teacher" as meaning and including "all persons regularly certificated by the teacher certificating authority of the State of Alabama who may be employed as instructors, principals, or supervisors in the public elementary and high schools of the State of Alabama." See Section 1 of Act No 499, General Acts 1939, page 759, codified as Title 52, Section 351, Code of Alabama 1940.

Authority for the establishment of regional vocational and trade schools is found in Act No. 673, General Acts 1947, page 514. While their management and control is vested in the State Board of Education, Section 4 of this Act expressly provides that the said board, among other duties, shall "appoint the members of the faculty and **fix the tenure** and salary of each." (Emphasis supplied.) Clearly, therefore, the teachers, instructors, principals, supervisors, and other faculty members of these regional vocational trade schools serve at the pleasure of the State Department of Education and are not "teachers" within the meaning of that term as above defined. Therefore, they are not covered by the provisions of the Teacher Tenure Law.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. G. H. Howard

Judge of Probate

Elmore County

Wetumpka, Alabama

Licenses — Penalty.

A contractor accepting contracts without first having obtained the license levied by Title 51, Section 496, Code of Alabama 1940, is liable for the fifteen percent penalty, plus six percent interest, and is also liable for the citation fee provided in Title 51, Section 835 (g), Code of Alabama 1940.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of August 18, 1951, is as follows:

"It will be appreciated if you will give us an opinion on the following matter:

"Templeton & Mason, Contractors, bought license as required under Title 51, Section 496, Code of Alabama 1940, at the beginning of the license year in an amount to exceed Fifty Thousand Dollars.

"Recently said Contractors accepted a contract the amount of which exceeded the amount of work that they could perform under the original license. The License Inspector cited this firm for the additional license as he stated that they had begun work on the new project.

"The Contractors feel that they were protected by the license on the amount of work performed. That they should be allowed to buy the additional license without a penalty.

"Your opinion as to whether the citation fee and penalty in this case will have to be collected will be appreciated."

It is my opinion that the contractor referred to in your inquiry would be liable for the fifteen percent penalty, plus six percent interest from the date of delinquency, and for the citation fee, where he accepts a contract to engage in the work referred to in Title 51, Section 496, Code of Alabama, before obtaining the license required by said section.

Title 51, Section 496, Code of Alabama 1940, provides, in part, as follows:

". . . and when such contractor shall have obtained a license for any year for which he has paid a license tax of less than the maximum above prescribed he shall not accept any contract or contracts during such year, the aggregate amount of which exceeds the maximum amount for which his license was obtained, unless and until he shall have paid such additional sum as will make the total license tax paid by him for that year

sufficient to cover the aggregate amount of such contract or contracts as prescribed above; and unless he pays such additional sum he shall be deemed to be acting without a license. . . ."

Title 51, Section 835 (c), Code of Alabama 1940, provides, in part, as follows:

" . . . Where any license issuable shall be delinquent, the same shall be subject to a penalty of fifteen percent of the amount of the license, which penalty must be collected by the probate judge or commissioner of license when the license is taken out together with interest at six percent from the date of delinquency."

Title 51, Section 835 (d). Code of Alabama 1940, provided as follows:

"'It shall be unlawful for any probate judge or other officer to fail to collect such penalties when issuing such license."

The penal provisions of Section 835, supra, are to be strictly construed. **Stewart v. Gilliland,** 219 Ala. 32, 121 So. 35; **McNeel v. Stiles,** 224 Ala. 181, 139 So. 219.

In an opinion reported in Biennial Report of Attorney General, 1934-36, page 628, it was held that a contractor would be liable for the fifteen percent penalty, and six percent interest from the date of delinquency, where he accepts a contract to engage in the work mentioned in Section 496, supra, before obtaining the license required by said section. The conclusion is reached in that opinion that the license levied by Section 496, supra, is predicated upon the acceptance of a contract or contracts and not upon the performance of the work contracted to be done.

From the facts stated in your inquiry, it seems clear that the contractor accepted a contract and began work in the performance of same, the aggregate amount of which exceeded the maximum amount for which his license was obtained at the beginning of the license year; and further, that he did not have the proper license when he accepted such contract, nor did he obtain the proper license before he began work on such contract. He was acting without a license, and was therefore delinquent; and was properly cited by the license inspector.

In view of the specific provisions of Section 835 (c) and (d), quoted above, and of the Attorney General's opinion referred to above, the contractor involved is liable for the fifteen percent penalty, plus six percent interest from the date of delinquency (date contract was accepted), and it would be unlawful for you, as probate judge, according to the provisions of Section 835 (d), supra, to fail to collect such penalty upon issuing the license.

Title 51, Section 835 (g), Code of Alabama 1940, provides, in part, as follows:

". . . All citations to delinquents shall be served by any lawful officer, or by the license inspector, or his deputy, who shall be allowed as a fee one dollar and fifty cents for each citation served, to be taxed against the delinquent. . . ."

In view of the above provisions of Section 835 (g), supra, and under the facts as stated in your inquiry, it is also my opinion that the citation fee is due and should be collected according to law.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. Howard Kirby

Clerk, Circuit Court

Etowah County

Gadsden, Alabama

Etowah County — Costs and Fees — Library Tax — Refunds.

Where Law Library fees have been paid into a special fund as a part of court costs under a provision subsequently declared unconstitutional, the amount paid may be refunded under the provisions of Title 51, Section 332, Code of Alabama 1940, if application is made within two years of the time of payment.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of August 6, 1951, is as follows:

"Please refer to Sections 2 and 3 of Act 482, page 700, of the General and Local Acts of 1949 Regular Session, and render to me your opinion on the following matter.

"In Case No. 4781, Dora Garmon, Complainant vs. Mary Nell Thornton, as Register of the Circuit Court of Etowah County, in Equity, appealed from Etowah County to the Supreme Court of Alabama, the above stated Sections were declared to be unconstitutional by said Supreme Court on the 8th day of February, 1951.

"Since said ruling, many persons have requested refund of the Law Library Fee paid by them as part of Court Costs, which has been remitted by this office to the Law Library Fund of Etowah County. All Law Library fees received by this office as part of costs have been remitted to said Fund. Nothing has been appropriated or expended from this fund for any purpose by the official designated in said Act, and nothing appropriated or expended by the Etowah County Board of Revenue.

"Would persons who have paid the Law Library Fee as part of Court costs be entitled to a refund? If they are entitled to refund would it be legal and proper for me as Clerk of the Circuit Court and Ex-

Officio Clerk of the County Court, to issue a certificate to each person due a refund from said Law Library Fund, setting forth style of case, amount due and soforth, directed to the Etowah County Board of Revenue, requesting said Board to make refund in view of the fact that the Supreme Court has declared above stated Sections to be unconstitutional?"

Ordinarily, taxes voluntarily paid, even though paid by mistake of law, cannot be recovered. This rule has been rigidly applied in Alabama. **Southern Railway Company v. City of Florence,** 141 Ala. 493, 37 So. 844; **National Bank of Boaz v. Marshall County,** 229 Ala. 369, 157 So. 444; **Rice v. Tuscaloosa County,** 242 Ala. 62, 4 So. 2d 497. However, authority has been given by statute for the refund of taxes paid voluntarily under mistake of law under certain conditions. Title 51, Section 332, Code of Alabama 1940. This section does not authorize the refund of taxes "to be paid to the State or to the general funds of the counties." Under Title 51, Section 334, Code of Alabama 1940, no action or suit or other procedure can be maintained for the refund of such taxes unless brought within two years after payment is made.

It would, therefore, appear that the refund of the law library fees paid into the Law Library Fund of Etowah County is authorized by statute, where the application for refund is made within two years of the date of payment. The law authorizing the collection of the tax has been declared unconstitutional. The payments made under the authority of this law did not go to the general fund of the county, but were required to be remitted to the Law Library Fund. Section 4 of Act No. 482, General and Local Acts 1949, page 700. In an opinion dated January 6, 1950, and found in Quarterly Report of Attorney General, Vol. 58, page 5, it was held by this office that Section 332, supra, authorized the Mobile County School Board to make a refund of school taxes where such taxes were paid voluntarily, but through error and mistake, when they were not lawfully due to be paid. Another opinion dated March 6, 1951, and found in Quarterly Report of Attorney General, Vol. 62, page 49, held that the city school board was authorized and required to make a refund of the taxes in question where the facts showed that Section 332 was applicable.

In the instant case, the Act providing for the Etowah County Law Library Fund gave the presiding judge of the Circuit Court of Etowah County, Alabama, control over all expenditures to be made from the fund. It is, therefore, believed that all applications for refund should be made to the said presiding judge. This is in conformance with thhe following language taken from an opinion dated February 18, 1925, and found in Biennial Report of Attorney General, 1924-26, page 89:

"In all cases asking for refund of money erroneously collected and paid over for special school taxes, application should be made to the board which has control of the disbursement of such money and the money should be refunded by the officer having such moneys in hand upon the order of such board."

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. W. L. Parrish

Judge of Probate

Chilton County

Clanton, Alabama

Counties — Chilton County — Judges of Probate.

1. Under the provisions of Title 12, Section 20, Code of Alabama 1940, when a meeting of the governing body of the county is held, without the attendance of the judge of probate, a special clerk must be appointed who must be paid by the judge of probate, notwithstanding the fact that a full-time clerk has been employed by the county governing body under the provisions of Title 23, Section 43, Code of Alabama 1940.

2. When a county commissioner presides over a meeting of the court of county commissioners in the absence of the judge of probate, he is entitled to receive the per diem and mileage provided in Act No. 662, General Acts 1939, page 1049.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an offcial opinion, bearing date of July 7, 1951, is as follows:

"As Judge of Probate and Presiding Officer of the Court of County Commissioners of Chilton County, Alabama, I hereby request your official opinion on the following questions:

"Title 12, Section 20 provides, 'When the Court is held without the attendance of the Judge of Probate, a special cleck must be appointed for such term, who must be paid by the Judge of Probate.'

"The Court of County Commissioners has employed a full time clerk. Please advise me:

"1. In view of the fact that the Court of County Commissioners of Chilton County has employed a full time clerk, is it necessary that they appoint a special clerk to attend at a meeting of the Court held in my absence?

"2. When a Commissioner presides over the meeting of the Court in my absence, is he entitled to receive from the County his usual fee for attending Court and mileage? If not, then what fees or compensation is he entitled to?"

In an opinion of this office under date of September 30, 1930, found in Biennial Report of Attorney General, 1928-30, page 977, it was held (1) that under the provisions of Section 157 of Act No. 347, General Acts 1927, page 391 (Title 23, Section 43, Code of Alabama 1940), a county governing body has

authority to employ a clerk whose duties are limited to matters concerning the construction, maintenance, and improvement of roads and bridges in the county; (2) that under the provisions of Section 6764, Code of Alabama 1923 (Title 12, Section 20, Code of Alabama 1940), where a meeting of the court of county commissioners is held without the attendance of the judge of probate, a special clerk must be appointed who must be paid by the judge of probate; and (3) that Section 157 of Act No. 347 (Title 23, Section 43), supra, does not permit the court of county commissioners to employ a special clerk at the expense of the county to attend the meetings of the court of county commissioners in the absence of the judge of probate. See also Biennial Report of Attorney General, 1930-32, page 667; and Quarterly Report of Attorney General, Vol. 18, page 71.

Although you do not so state in your inquiry, I assume that the full-time cleck employed by the governing body of Chilton County was employed under the authority of Title 23.

In view of the holding of the above opinions, it is my conclusion that under the provisions of Title 12, Section 20, Code of Alabama 1940, when meeting of the court of county commissioners of Chilton County is held without the attendance of the judge of probate, a special clerk must be appointed who must be paid by the judge of probate, notwithstanding the fact that a full-time clerk has been employed by the county governing body under Title 23, Section 43, supra.

In answer to your second inquiry, it is my opinion that when a county commissioner presides over a meeting of the court of county commissioners in the absence of the judge of probate, he is entitled to receive the per diem mileage provided in Act No. 662, General Acts 1939, page 1049.

There is no provision of law providing a different compensation than that provided by Act No. 662, supra, for a commissioner when presiding over a meeting of the court of county commissioners in the absence of the judge of probate. The compensation of the judge of probate for presiding in the court of county commissioners and keeping the minutes of said court is fixed by Title 11, Section 29, Code of Alabama 1940, as amended by Act No. 46, Regular Session 1951, approved May 23, 1951, rather than by Act No. 662, supra. See Quarterly Report of Attorney General, Vol. 35, page 97.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. Ralph P. Eagerton

Chief Examiner

Department of Examiners of Public Accounts

CAPITOL

Sheriffs — Costs and Fees — Clerks.

1. Under the provisions of Act No. 177, General Acts 1947, page 62, it is the duty of the sheriff to prepare and file with the clerk or with the judge, if there is no clerk, an affidavit showing the name of the defendant and the mileage traveled to and from the place of arrest. This duty is imposed upon the sheriff, even though he is on a salary basis.

2. A sheriff on a salary basis who fails to attempt to collect his mileage fee under the provisions of Act No. 177, supra, is liable to the county for the amount of said fees.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of May 16, 1951, is as follows:

"Will you please give me your official opinion on the following questions relative to Act No. 177, Page No. 62, General Acts 1947, approved July 21, 1947, Section No. 1 of which reads as follows:

"'Any Sheriff of the State of Alabama, who serves or causes to be served a writ of arrest, or who causes to be arrested, or like process issued by any court of competent jurisdiction, in Alabama, in any criminal or quasi-criminal proceedings, shall be entitled, on conviction of the defendant, to receive for such service a sum equivalent to ten cents per mile for each mile traveled within the county of the arrest from the court house by the most direct route to the point of arrest and return. Mileage for only one trip to make the arrest may be charged.'

"Section 3 of said Act provides, supra, that the trial judge of such court shall approve the amount shown by the Sheriff as part of the cost.

"1. Is it your opinion that it is incumbent upon a Sheriff who is on a fee basis to prepare and present for approval of the trial judge the said mileage affidavit before same may be taxed and collected as cost or is it the duty of the clerk of the trial to prepare and present same for approval of the judge in order for him (the clerk) to tax this cost in favor of the Sheriff?

"2. If your answer to question #1 places such responsibility on a Sheriff on a fee basis of obtaining the approval of the trial judge then does it follow that the same responsibility shall be placed on a Sheriff who is on a salary by virtue of statue which provides that all costs, fees, etc., of the Sheriff shall be paid into the General Fund of the County?

"3. If your answer to question #2 is in the affirmative, is the Sheriff liable for the loss of such fees to the County for his failure to prepare, present and seek to obtain the approval of the trial judge on said mileage affidavit?

"We have at this time several reports in this office which cannot be handled to a definite conclusion until such time as we have your opinion concerning the matter."

I am of the opinion that all three of you inquiries should be answered in the affirmative.

The act referred to in your inquiry is Act No. 177, General Acts 1947, page 62. Section 1 of said act allows the sheriff ten cents a mile for each mile traveled when he serves a writ of arrest. Section 2 of this act makes it the duty of the trial judge to act as costs the mileage fee due the sheriff. Section 3 of the act provides, in part, as follows:

"That the sheriff of each county shall make an affidavit showing the mileage traveled to and from the place of arrest, together with the name of the defendant, which affidavit is to be filed by the sheriff of each county with the clerk of the court where the case is to be tried or with the judge where there is not a clrk. That the trial judge of such court shall approve the amount shown in the affidavit before the same can be collected by the sheriff as part of the cost."

The above-quoted part of Section 3 of Act No. 177, supra, could not be more clear in placing the duty upon the sheriff himself to prepare and make the affidavit showing the name of the defendant and the mileage traveled to and from the place of arrest, and file it with the clerk of the court, or with the judge where there is no clerk. This is true whether the sheriff is on a fee basis or a salary basis. The filing of this affidavit by the sheriff is necessary before the trial judge is authorized to approve the affidavit and before the court is authorized to tax the mileage fee as costs in the case. It is not incumbent upon the clerk to file the affidavit, but it is incumbent upon the sheriff to calculate the mileage and file the affidavit. Of course, when the sheriff files affidavit with the clerk, it is my opinion that it is the clerk's duty to turn the affidavit over to the trial judge or bring it to his attention.

It is provided in Section 2 of Act No. 177, supra, that "where the sheriff of a county is on a salary that the cost provided for in Section 1 shall be taxed and shall be paid into the general fund of the county."

It is my opinion that the sheriff is under a duty, even though he is on a salary basis, to file the affidavit referred to above. In fact, the sheriff has a greater responsibility when he is on a salary to file his affidavit claiming mileage, for the reason that the fees do not belong to the sheriff in such case, but belong to the county. Your inquiry No. 2, therefore, is answered in the affirmative.

In answer to your inquiry No. 3, I am of the opinion that since it is the sheriff's duty to file the affidavit claiming his mileage, if he is on a salary basis, and such fee is payable into the general fund of the county, then the sheriff would be liable upon his failure to prepare and file the affidavit and seek to obtain approval of the trial judge in order to collect the mileage fee for the county general fund. When officers are on a salary and not entitled to fees, they must claim these fees for the benefit of the county. See Quarterly Report of Attorney General, Vol. 16, page 267. The sheriff in his official bond promises that he will faithfully perform his duties. One of those duties is that

he will claim the fees to which he is entitled for the county, if he is on a salary, and place those fees in the general fund. If the county loses any fees to which it is entitled by reason of the default or negligence of duty by the sheriff, then the sheriff would be liable to the county for the loss occasioned by his default or negligence.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. W. H. Cunningham

Clerk, Juvenile Court

Cherokee County

Centre, Alabama

Cherokee County — Juvenile Courts — Costs and Fees.

1. The Probate Court of Cherokee County has original and concurrent jurisdiction over matters pertaining to children or cases of nonsupport. Act No. 162, General and Local Acts of 1949, page 189; Title 34, Section 94, Code of Alabama 1940.

2. In desertion and nonsupport cases, no costs should be taxed. Title 34, Section 102, Code of Alabama 1940.

3. Trial tax is only charged in cases docketed in the circuit court. Title 51, Section 20, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of July 16, 1951, is as follows:

"On July 9, 1951, one Joe Fuller was convicted in the juvenile Court of Cherokee County, Alabama, of desertion and nonsupport, by Honorable F. H. Norton, Judge of the Juvenile Court and was fined $100.00 and costs.

"Will you please advise me as follows:

"1. Should I collect a Solicitor fee in this case, and if so how much?

"2. Should I collect a trial tax in this matter.

"3. No witnesses were summoned by me or served by the Sheriff, however, several witnesses voluntarily appeared and testified and have asked that they be paid witness fees and mileage. Should I collect this witness fee and mileage?

"Please give me this information at your earliest convenience. I feel sure that you have heretofore passed on this same question but we do not have an opinion on these matters in our office.

The Probate Court of Cherokee County has original and concurrent jurisdiction with the circuit court over all matters, cases, or causes involving children or cases of non-support. Section 1, Act No. 162, General and Local Acts 1949, page 189; Title 34, Section 94, Code of Alabama 1940. Therefore, the Probate Court of Cherokee County has jurisdiction over desertion and nonsupport cases instituted under the provisions of Title 34, Section 89, et seq., Code of Alabama 1940.

You are advised in answer to your inquiries that none of the fees or costs may be taxed in desertion and nonsupport cases.

Title 34, Section 102, Code of Alabama 1940, which is a part of Article 3, Chapter 4, Title 34 (Sections 89-104), Code of Alabama 1940, provides, in part, as follows:

"There shall be no costs of any kind whatsoever taxed in cases arising under this article."

Therefore, you should tax no solicitor's fee, witness fees, or mileage in nonsupport cases. Quarterly Report of Attorney General, Vol. 36, page 61; Biennial Report of Attorney General, 1934-36, page 191. In fact, no costs whatsoever may be taxed. Quarterly Report of Attorney General, Vol. 25, page 78.

In connection with your inquiry concerning the collection of trial tax, you are advised that the trial tax is only collected in cases docketed in the circuit court. Title 51, Section 20, Code of Alabama 1940. You have not referred me to any local act providing for any other trial tax.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. Reo Kirkland

Clerk and Register

Circuit Court

Escambia County

Brewton, Alabama

Registers — Costs and Fees — Sales.

A register who performs no services in making a sale is not entitled to a commission to Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 374, General Acts 1947, page 262.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of April 13, 1951, is as follows:

"I would like to request your official opinion, at your convenience, on the below questions numbered 1 and 2.

"1. In an equity case where the petitioner files the petition with the court asking for authority to sell the interest in real estate of a minor or other incompetent person at private sale, where the sale is conducted entirely by the parties with no actual sale being made by the register, except through the Judges's order authorizing said sale, is the Register entitled to his commision as provided for in Code of 1940, Title 11, Section 27?

"2. Where the petitioner files the petition in the Circuit Court, in Equity, asking the court for authority to permit a minor or other incompetent person to join with adult tenants-in-common in sale of real estate at a private sale where no actual sale is made by the Register, other than through the authority of the decree, granting to the petitioner the right to join with the adult tenants-in-common in the sale of the interest of the minor or other incompetent person, is the Register entitled to his commission as provided for in the Code of 1940, Title 11, Section 27?"

You would not be entitled to a commission on the sales in either of the instances set out in your inquiry, for the reason that the sale is a private one, and the register performs no services for which he is entitled to receive fees. **Rome and D. R. Company, et al v. Sibert, et al.,** 97 Ala. 393, 12 So. 69; Biennial Report of Attorney General, 1934-36, page 459.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. J. M. McCullough, Jr., Director

Department of Corrections & Institutions

CAPITOL

Department of Corrections and Institutions — Prisons and Prisoners.

The Department of Corrections and Institutions may sell prison goods to persons or firms in Alabama, to the Federal Government, District of Columbia, and to other states and instrumentalities thereof in properly marked packages.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of April 19, 1951, is as follows:

"We have today received an inquiry from a firm in Selma, Alabama, copy of which is attached. We have also received a number of such inquiries from other private firms and from penal institutions in other states.

"I would appreciate it if you would advise this department whether or not we can legally sell prison made goods to anyone in Alabama and also to state institutions in other states.

"Your early reply will be appreciated as we have several orders on file at the present time."

I know of no provision of law which prohibits the sale or shipment of prison made products to persons or firms in Alabama. There are, however, several federal limitations upon the shipment of prison made goods in interstate commerce which should be called to your attention. Title 18, Section 1761, U. S. C. A., provides as follows:

"§ 1761. **Transportation or importation**

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(b) This chapter shall not apply to agricultural commodities or parts for the repair of farm machinery, nor to commodities manufactured in a Federal, District of Columbia, or State institution for use by the Federal Government, or by the District of Columbia, or by any State or Political subdivision of a State. June 25, 1948, c 645, 62 Stat. 785."

It will be seen that shipments in interstate commerce of agricultural commodities, repair parts for farm machinery, and products for use by the Federal Government, District of Columbia, or by any state or political subdivision of a state, are permitted without penalty.

Title 18, Section 1762, U. S. C. A., provides for the proper marking of packages containing prison made products. Such products, when shipped in interstate or foreign commerce, " . . . shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package."

In view of the above provisions, it is my opinion that the Department of Corrections and Institutions can legally sell prison made goods to anyone in Alabama, and to state institutions in other states, provided that in the latter instance the packages containing such goods are properly marked.

Your attention is also invited to Title 49, Section 60, U. S. C. A., which provides as follows:

"§ 60. **Divesting prison made goods of interstate character**

"Five years after January 19, 1929, all goods, wares, and merchandise, manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise. (Jan. 19, 1929, c. 79, §§ 1, 2, 45 Stat. 1084.)"

It is possible that some states may have statutes which prohibit or severely regulate the sale of prison made goods in such states. In this opinion, no attempt has been made to ascertain and enumerate those states.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. D. G. Gill, M. D.

State Health Officer

Department of Public Health

CAPITOL

Health and Health Department.

Under Title 22, Section 7, Code of Alabama 1940, the State Board of Health or its representatives have the right to enter industrial and manufacturing establishments in order to inspect conditions that might be prejudicial to health.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of June 11, 1951, is as follows:

"Subsection (3) of Section 7 of Title 22 of the 1940 Code authorizes the State Board of Health 'to investigate the influence of localities and employment on the health of the people.' Subsection (4) names a number of places the Board has authority to inspect, and among them are industrial and manufacturing establishments.

"Question arises as to whether such authority and jurisdiction gives representatives of the State Board of Health right of entry upon such premises to investigate and inspect to determine whether conditions exist that are prejudicial to health. Your opinion will be appreciated."

Title 22, Section 7, Code of Alabama 1940, is, in pertinent part, as follows:

"§ 7. State board of health; authority and jurisdiction.—The state board of health shall have authority and jurisdiction: (1) To exercise general control over the enforcement of the laws relating to public health. (2) To investigate the causes, modes of propagation, and means of prevention, of diseases. (3) To investigate the influence of localities and employment on the health of the people. (4) To inspect all schools, hospitals, asylums, jails, almhouses, theatres, opera houses, courthouses, churches, public halls, prisons, stockades where convicts are kept, markets, dairies, milk depots, slaughter pens or houses, railroad depots, railroad cars, street railroad cars, lines of railroads and street railroads, including the territory contiguous to said lines, industrial and manufacturing establishments, offices, stores, banks, club houses, hotels, rooming houses, residences, and other places of like character, and whenever insanitary conditions in any of these places, institutions, or establishments, or conditions prejudicial to health, or likely to become so, are found, proper steps shall be taken by the proper authorities to have such conditions corrected or abated. * * * *"

The purpose of Subsection 4 of Section 7, supra, is to authorize the State Board of Health to inspect certain places for unsanitary conditions or conditions prejudicial to health, and to take proper steps to see that such conditions are corrected.

"Webster defines 'inspect' to mean 'to look; to view or oversee for the purpose of examination; to look into; to view and examine for the purpose of ascertaining the quality or condition of the thing; . . . .' **People v. General Committee,** 49 N. Y. S. 723, 728, 25 App. Div. 339." 21 Words and Phrases, Per. Ed., page 643.

"The inspection of premises means a critical examination. **Armour v. Brazeau,** 16 N. E. 904, 191 I11. 117." 21 Words and Phrases, Per. Ed., page 646.

"The word 'inspection' has been defined by the supreme court of the United States, — as accurately, perhaps, as may be elsewhere found, — to be somethng which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. * * * *" **State ex rel. Robertson v. McGough,** 118 Ala. 159, 24 So. 395. Citing **People v. Compagnie Generale Transatlantique,** 107 U. S. 59, 2 Sup. Ct. 87.

It is quite clear from the above definitions that in order to inspect places for unsanitary conditions, or conditions prejudicial to health, it would be necessary for the health authorities to enter the premises in question.

It is a well recognized principle that the protection of the public health is one of the first duties of the government. Therefore, powers conferred on boards of health to enable them to perform their important functions in safeguarding public health should receive a liberal construction. 39 C. J. S., Health, Section 9, page 823.

I, therefore, conclude that representatives of the State Board of Health nave the right to enter industrial and manufacturing establishments in order to inspect conditions that might be prejudicial to health.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. J. M. McCullough, Jr.

Director, Department of

Corrections and Institutions

Montgomery, Alabama

Correction and Institutions, Department of — Convicts — Prisons and Prisoners.

1. The Director of the Department of Corrections and Institutions, while having statutory authority to administer oaths in certain instances, cannot delegate to subordinates his authority in this respect.

2. The authority of the Director of the Department of Corrections and Institutions, to summon, swear, and examine witnesses as to

any matter concerning the management and treatment of convicts, includes the authority to summon, swear, and examine any competent witness in the state whose testimony he deems material.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of May 31, 1951, is as follows:

"Section 63, Title 45, Code of Alabama 1940 reads as follows:

" 'The director shall have authority to summon, swear, and examine witnesses as to any matter concerning the management and treatment of convicts; and the director may administer the oath of office to guards and employees, and may administer oaths as to the correctness of any account or statement in regard to the convict system.'

"In connection with Section 63, I would like to have your opinion as to whether it will be possible for me to delegate this authority to a subordinate under the provisions of Section 7, Title 45, Code of Alabama 1940, the first sentence of which reads as follows:

" 'All functions and duties of the department shall be exercised by the director, acting by himself or by and through such administrative divisions or such officers or employees as he may designate.'

"I would also appreciate an opinion from you as to where my authority begins and ends as to the summoning, swearing, and examining of witnesses — whether this section gives me the authority to call in witnesses other than employees of this department."

1. In my opinion, your first question should be answered in the negative.

Title 45, Section 63, Code of Alabama 1940, which you quote, confines to the Director of the Department of Corrections and Institutions the authority to summon, swear, and examine witnesses. In neither that section nor elsewhere in the law, do I find statutory authority for a delegation of this authority. The rule is that an officer or other person has only such authority, if any, to administer oaths or affirmations as is conferred on him by Constitution or statute. See 67 Corpus Juris Secundum, Oaths and Affirmations, Section 5, page 6. In my judgement, your general power and authority, as given by Title 45, Section 7, Code of Alabama 1940, to delegate to subordinates administrative duties and responsibilities, does not include the power or authority to delegate to a subordinate the authority to administer the oaths referred to in Section 63, supra

2. In my opinion, your second question should be answered in the affirmative.

Your chief duty as Director of the Department of Corrections and Institutions involves the care, custody, and management of persons convicted of crime and sentenced to imprisonment therefor. Section 63, supra, expressly provides that you have authority to summon, swear, and examine witnesses as to any matter concerning the management and treatment of convicts. This section does not limit or restrict witnesses who may be examined, to employees

of the Department of Corrections and Institutions. On the contrary, I think the Legislature recognized that frequently the best evidence concerning the mismanagement or mistreatment of convicts may come from witnesses disconnected with the department. It is my opinion, therefore, that when you are inquiring into any matter concerning the management or treatment of convicts, you have authority under Section 63, supra, to summon, swear, and examine any competent witness in the state whose testmony you deem material to your inquiry.

Yours very truly,

SI GARRETT

Attorney General

September 29, 1951

Hon. G. H. Howard

Judge of Probate

Elmore County

Wetumpka, Alabama

Licenses — Opinions Overruled.

1. Where a licensee, operating a business subject to a license under the provisions of Title 51, Section 614, Code of Alabama 1940, has procured the proper license for a particular classification and and later during the same license year becomes liable for the license in a higher classification, credit may be allowed on the new license for the amount paid for the original license.

2. Opinion reported in Quarterly Report of Attorney General, Volume 19, page 211, overruled.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of June 19, 1951, is as follows:

"Please give me an official opinion on the following question that has arisen in the sale of Privilege License in this office.

"A person operating a Box Factory here in Wetumpka bought license under Section 614, Title 51, 1940 Code of Alabama, and paid the proper amount on the number of men that he was working at that time. He later increased the number of employees and was recently cited by the License Inspector for the additional license. In check on this matter we found that the amendment to Section 614 refers to a ruling of the Attorney General of April to June 1940, at page 211 which states that where an operator has procured the proper license for a particular classification

and later became liable for the license in a higher classification that no credit may be allowed on the new license for the amount paid for the original license.

"In making a further check of the license schedule we found that Section 848, as amended, Title 51, Code of 1940, provides for the collection of an additional amount due on a license and prescribed the way and manner in which license should be issued.

"Your opinion is requested as to which of the above named sections would govern in this particular case."

Title 51, Section 614, Code of Alabama 1940, provides as follows:

"§614. Veneer mills, planing mills, box factories, etc.—Each person, firm or corporation engaged in the operation of veneer mill, planing mill, box factory, handle factory, or any other factory where lumber or timber is sawed or made into a finished or semi-finished product, other than a saw mill licensed under section 585 of this title, shall pay a privilege tax based on the number of men employed or engaged in the manufacture of the products produced by such mills, as follows: Where there are five or less men employed or so engaged, five dollars. Where there are more than five men and less than ten so employed or engaged, ten dollars. Where there are more than ten men and less than twenty so employed or engaged, thirty dollars. Where there are more than twenty men and less than forty so employed or engaged, eighty dollars. Where there are more than forty men and over, one hundred and twenty dollars. It is the intention hereof that where a person, firm or corporation shall pay a privilege tax under section 585 or under section 546 of this title, then no privilege license shall be charged or collected hereunder."

In considering the above statute, it is my opinion that where the change in the number of employees during any license year places a licensee in a higher license bracket, credit for the amount paid for the original license can and should be allowed on the amount paid for the new license. A different conclusion would mean that a licensee beginning a business subject to a license under Section 614, supra, with 4 employees and progressively increasing during one license year his employees to more than forty so as to come within each bracket set out in Section 614, supra, as the number of his employees are increased, would be required to purchase five separate licenses at a total of $245 for State purposes, plus issuance fees; whereas a licensee having sufficient capital to begin a business subject to a license under Section 614, supra, with more than forty employees would be required to purchase only one license for $120 for State purposes, plus issuance fees. It is my opinion that such was not the legislative intent in enacting Section 614, supra.

Title 51, Section 848, Code of Alabama 1940, as amended by Act No. 544, General Acts 1943, page 533, to which you refer, has no application to the question at issue. Section 848, as amended, supra, provides as follows:

"(c) In case of the Issuance of a license for less than the amount due therefor, upon the payment of the additional amount due for such license an additional license may be issued, in such manner as to allow credit for the amount previously paid by the licensee, and there shall be endorsed on the face of such additional license the words 'Additional To License No.....' "

Under the facts stated in your request, the **proper amount** was paid for the original license issued. Section 848 (c), supra, applies only "in case of the issuance of a license for **less than the amount due therefor**....." (Emphasis ours.)

The opinion reported in Quarterly Report of Attorney General, Volume 19, page 211, is in conflict with this opinion and is hereby overruled.

Yours very truly,

SI GARRETT

Attorney General.

September 29, 1951

Hon. W. A. Spencer, Mayor

Town of Prattmont

Autauga County

Prattmont, Alabama

Municipalities — Licenses — Public Utilities.

1. A municipality is prohibited from providing natural gas lines to the residents outside the corporate limits but within the police jurisdiction of a town, when the gas lines on completion are to be owned and operated by a private company.

2. The excess, if any, from the sale of licenses to businesses outside the corporate limits but within the police jurisdiction of a town must be used for purposes provided in Title 37, Section 733, Code of Alabama 1940.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of June 12, 1951, is as follows:

"As Mayor of the incorporated Town of Prattmont, located in Autauga County, Alabama, I propound the following questions to you and will appreciate your giving me an official opinion thereon:

"1. Is it possible for the Town of Prattmont to obligate itself on its general credit in order to extend the gas line from the corporate limits of the Town of Prattmont into the police jurisdiction of said town for the purpose of supplying the residents of said police jurisdiction with natural gas?

"2. Assuming that there might possibly be sufficient revenue derived from the licenses sold by the Town of Prattmont to the residents of the Police jurisdiction thereof, above the amount required for the protection of the lives, health and property of the residents of said police jurisdiction and the maintenance of good order and quiet of the community and preservation of public morals in said police jurisdiction of the Town of Prattmont, as provided by Title 37, Section 733, Code of Alabama 1940, can such excess be used for the purpose of providing natural gas facilities to the residents thereof, or if not, what disposition, if any, can be made of any excess derived from the sale of such licenses by the Town of Prattmont to the residents of the police jurisdiction of said town?

"In connection with the foregoing questions, this is to advise that the natural gas system within the corporate limits is not owned by the Town of Prattmont but is owned by a private gas company and neither the extended gas line nor the natural gas to be conveyed through the extended gas line or lines will belong to the Town of Prattmont. In other words the citizens of the police jurisdiction of the Town of Prattmont desire that the gas lines be extended into the police jurisdiction and each resident thereof desiring natural gas proposes to pay his or her own monthly bill directly to the gas company. The concern here is whether or not the town can stand the expense of extending the lines when the gas company is not willing to do so on the ground that such an extension will not be profitable to the private company, unless it were repaid for the extension upon the completion of the work in laying the line or lines."

The answer to your first question is in the negative.

The Constitution of Alabama 1901, Section 94, provides as follows:

"The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

The provisions of this section prohibit a town from lending its credit, or granting public money in aid of any individual, private corporation, association, or company.

The facts as stated in your letter show that the gas line when extended would be owned and operated by a private company. The extension of the gas line at the expense of the Town of Prattmont would be the granting of public money in aid of a private gas company, which is expressly prohibited by Section 94, supra.

Act No. 502, General Acts 1943, page 477, provides as follows:

"That any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded. Provided, further, that when the place at which any such business, trade or profession is done or carried on within the police jurisdiction of two or more municipalities which levy the licenses thereon authorized by this act, such licenses paid to and col-

lected by that municipality only whose boundary measured to the nearest point thereof is closest to such business, trade or profession. Provided that this act shall not have the effect to repeal or modify the limitations in Article 3, Chapter 15, Title 37, of the 1940 Code of Alabama, relating to railroad, express companies, sleeping car companies, telegraph companies, telephone companies and public utilities, and insurance companies and their agents."

The excess, if any, derived from the sale of licenses to residents within the police jurisdiction of Prattmont cannot be used for providing natural gas facilities for such residents, under the facts stated in your letter, for the reason set out in the answer to your first inquiry.

The right to license a business outside the corporate limits of a town, but within the police jurisdiction thereof, conferred by Act No. 502, supra, is for police purposes merely, and not for the purpose of raising revenue. **Van Hook v. City of Selma,** 70 Ala. 361; **Hawkins v. City of Prichard,** 249 Ala. 234, 30 So. (2d) 659. The amount of the license, however, need not be confined to the expense of issuing it, and a reasonable compensation may be charged for the additional expense of municipal supervision over the particular business at the place where it is licensed. **City of Birmingham v. Wilson,** 27 Ala. App. 288, 172 So. 292.

If the amount in excess of the actual cost of this supervision should be too great, such a license may be found to be a revenue measure and would, therefore, be unconstitutional. **White v. City of Decatur,** 225 Ala. 646, 144 So 873; **Hawkins v. City of Prichard,** supra. However, the courts realize that it is not always possible for the municipality to estimate the exact cost for the police and fire protection furnished in the area outside the corporate limits but within the police jurisdiction, and may, therefore, have a reasonable excess in this fund. **City of Birmingham v. Wilson,** supra.

I am of the opinion that this excess, if any, should be used for the purposes set out in Title 37, Section 733, Code of Alabama 1940, and should such excess become too large, the cost of the license so levied should be decreased so as to remove the excess.

Yours very truly,

SI GARRETT

Attorney General.

September 29, 1951

Hon. Charles C. McWhorter

Chairman, Board of Revenue

Lawrence County

Moulton, Alabama

Lawrence County — Solicitors — Officers and Offices — Attorneys — Counties.

1. The county solicitor of Lawrence County (Act No. 519, Local Acts 1927, page 375) may be employed by the county governing body of Lawrence County (Section 4, Act No. 18, Local Acts 1951, approved May 18, 1951) as an attorney for said body.

2. The county solicitor of Lawrence County may be employed by the county governing body as attorney without holding two offices of profit, as prohibited by Section 280, Constitution of Alabama 1901, because such employment is mere employment and not the holding of an office said employment being terminable at will and said attorney exercising no sovereignty.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 7, 1951, is as follows:

"Act No. 18 of the 1951 Session of the Legislature of Alabama created the Board of Revenue of Lawrence County and, in Section 4 thereof, said Board was given the authority to employ or retain an attorney and prescribe the duties and fix the compensation for such attorney.

"The office of County Solicitor of Lawrence County was created by Act No. 519, 1927 Local Acts, page 375, and it was provided therein that he 'shall receive the same fees and compensation now allowed the Deputy Solicitor of said County.' Under the provisions of Act No. 249 Local Acts of 1919, page 86, the Deputy Solicitor of Lawrence County was placed on a fee basis.

"In view of the above, may the Board of Revenue of Lawrence County employ the County Solicitor of Lawrence County to render services to said Board and compensate said Solicitor from the General Fund of said county? Your attention is directed to Section 258, Title 13, 1940 Code of Alabama, in this connection.

"In the event your answer to the above inquiry is in the affirmative, may said Board likewise employ and compensate said County Solicitor for services rendered in the event the 1919 Local Act above-mentioned is repealed and the 1927 Local Act above-mentioned is amended to read, in part, as follows: 'The County Solicitor of Lawrence County shall receive as compensation for the duties performed in said County Court the same fees as are now or may hereafter be provided by law for solicitors, to be collected and paid to him in the manner provided for by Section 85, Title 11, Code of Alabama'?"

I am of the opinion that both of your inquiries should be answered in the affirmative; that is to say, the present county solicitor of Lawrence County may be employed to render services to the Board of Revenue of Lawrence County and be paid from the general fund of the county whether or not Act No. 249, Local Acts 1919, page 86, is repealed and Act No. 519, Local Acts 1927, page 375 is amended as described in your inquiry.

Section 10 of Act No. 249, supra, placed the deputy solicitor of Lawrence County on a fee basis, said deputy solicitor to receive the same fees as those received by solicitors. Section 10, Act No. 249, supra, was amended by Act No. 22, Local Acts, special session, 1920, page 171, in respects not here Material.

The office of deputy solicitor of Lawrence County was expressly abolished by Act No. 437, Local Acts 1927, page 343, approved August 30, 1927, and effective on the first Monday after the second Tuesday in January of 1931. Shortly thereafter, Act No. 519, supra, approved September 9, 1927, created the office of county solicitor of Lawrence County, which was made an elective office, and said county solicitor of Lawrence County was placed on a fee basis, Section 4 of said Act providing that the county solicitor of Lawrence County shall receive the same fees and compensation as now allowed the deputy solicitor of said county. Of course, I have already stated that the deputy solicitor received the same fees as the solicitor, so the county solicitor of Lawrence County, by Section 4 of Act No. 519, supra, was to receive solicitor's fees. (See Title 11, Section 85, Code of Alabama 1940.) It is further provided in Section 5 of Act No. 519, supra, as follows:

> "It is the intention of this act that said County Solicitor shall take the place of the Deputy Solicitor of said County and prosecute in all cases in which a Deputy Solicitor is required to prosecute. And that all laws now in force pertaining to the Deputy Solicitor of Lawrence County shall remain in force and apply to the County Solicitor hereby created except those in conflict with the provisions of this act."

It is clear, therefore, that after the passage of Act No. 519, supra, Lawrence County was left without a deputy solicitor, who was formerly appointed by the solicitor (see Title 13, Section 256, Code of Alabama 1940, and No. 249, supra), and by virtue of Act No. 519, supra, now has a county solicitor, who is an elective officer, and who receives as his compensation the solicitor's fees provided by law. All the laws applying to a deputy solicitor were, by the very terms of Act No. 519, supra, made applicable to the office of county solicitor. One of the laws which applies to a deputy solicitor, and which, of course, applies to the county solicitor of Lawrence County, is Title 13, Section 258, Code of Alabama 1940, which provides as follows:

> "In all counties of the State of Alabama where the deputy solicitor is paid on a fee basis he may, and it is hereby made lawful for him to enter into contracts with counties, including the county of which he is deputy solicitor, for work or services, or he may be employed by contract by counties."

Another law applying to deputy solicitors is Title 13, Section 260, Code of Alabama 1940, as amended by Act No. 630, General Acts 1951, approved September 4, 1951 (Ms.), which provides:

> "The officers named in this article shall receive no compensation whatsoever for their service as such officers except the compensation provided in this article; provided, that Courts of County Commissioners and Boards of Revenue may retain or employ the Deputy Solicitor of the County to perform such duties as are not required by law of such deputy

solicitor of the County, and the agreed compensation to such deputy solicitor of the County may be paid as are claims to Grand and petit jurors."

It is my opinion that these laws, above quoted, apply to the county solicitor, as he stands in the place of the former deputy solicitor. We, therefore, have express legislative authority for the county solicitor of Lawrence County, who is on a fee basis, to be employed by the county as an attorney for the County governing body.

It should also be pointed out, as noted in your inquiry, that the Board of Revenue of Lawrence County is expressly authorized to employ an attorney. Section 4, Act No. 18, Local Acts 1951, approved May 18, 1951. See also **State v. Stone,** 235 Ala. 233, 178 So. 18, and Title 13, Section 229, subsection 8, Code of Alabama 1940. It is further my opinion that, even though the county solicitor of Lawrence County is employed or retained by the county governing body to render legal services for the governing body, he would not violate Section 280 of the Constitution of Alabama 1901, which prohibits the holding of two offices of profit at one and the same time. An attorney who is employed by a county governing body exercises no sovereignty, is removable at will,, and is a mere employee as distinguished from an officer. See **Ward v. State, 203** Ala. 306, 82 So. 662.

Your second inquiry is based upon the proposal that the Local Act of 1919, supra, be repealed and the Local Act of 1927, supra, be amended, as described in your inquiry. In my opinion, such legislation would not affect the conclusions reached in this opinion at all. If the Local Act of 1919, which provides for a deputy solicitor of Lawrence County, were repealed, the county would still have a county solicitor as provided in Act No. 519, supra. The county solicitor would still be on a fee basis, as provided in Section 4 of said Act No. 519, supra, and that fee basis as previously discussed allows the county solicitor of Lawrence County to receive solicitor's fees, because he receives the same fees as the deputy solicitor who received the same fees as the solicitor under the provisions of Acts No. 249 and No. 22, supra, which acts are merely referred to in Act No. 519. The amending of the 1927 Local Act in the manner stated in your inquiry would have no effect whatsoever, because the county solicitor of Lawrence County is already entitled to receive solicitor's fees as provided by Title 11, Section 85, Code of Alabama 1940.

Yours very truly,

SI GARRETT

Attorney General.

September 29, 1951

Hon. L. H. Montgomery

Judge of Probate

Greene County

Eutaw, Alabama

Deeds — Mines and Mining — Real Estate.

The word "mineral" as used in a grant or reservation, does not include gravel in the absence of the local usage or expressions of intent to the contrary.

Opinion by Assistant Attorney General Arbuthnot.

Your request for an official opinion, bearing date of August 16, 1951, is as follows:

"The Allisons own a tract of land in the western part of this county, a Mr. Cameron owns the mineral right on this land.

"We are getting about $1000.00 worth of gravel off this land for road construction. The Allisons claim gravel is not a mineral and that they are entitled to pay for this gravel.

"Mr. Cameron claims gravel is a mineral and that he is entitled to be paid for the gravel.

"Please give your opinion as to whether or not gravel for road purposes is a mineral, so we will know whom to pay for this gravel."

The question of the scope of the definitions of the word "mineral" has been discussed at length by the Washington Supreme Court in **Puget Mill Co. v. Duecy,** 1 Wash. 2d 421, 96 P. 2d 571. The court recognized that the ordinary definitions would throw little light upon the significance of the word as used in a conveyance. The word "mineral" under a broad, general, popular definition might embrace the soil itself. On the other hand, a definition which would confine it to the more precious metals would so limit its application as to destroy half the value of the grant. The court concluded that the legal meaning of the term comes somewhere between these two definitions, and that the most reasonable rule is that each case must be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor if it can be ascertained.

Other decisions have recognized that the intention of the parties must govern, but have required express evidence of such intention before holding that a conveyance of mineral rights includes the right to extract gravel. **Holloway Gravel Company, Inc. v. McKowen,** 200 La. 917, 9 So. 2d 228. In this case a sale of land was made subject to a reservation by the vendors of "nine-twentieths of all the mineral, oil and gas rights in and upon the lands conveyed." The gravel company under an oral lease from the vendee began to extract sand and gravel. The court concluded that sand and gravel were not included under the reservation of the mineral rights in view of the evidence that the parties only discussed the reservation of oil, gas and minerals, and that no mention was made by the vendor that it was his intention to in-

clude sand and gravel in the reservation clause. Cf. **State ex rel. Commissioners of Land Office v. Hendrix,** 196 Okla. 596, 167 P. 2d 43; **Watkins v. Certain-Teed Products Corp.,** 231 S. W. 2d 981 (Tex. Civ. App. 1950); **Psencik v. Wessells,** 205 S. W. 2d 658 (Tex. Civ. App. 1947).

In **United States ex rel. Tennessee Valley Authority v. Harris,** 115 F. 2d 343 (5th Cir. 1940), the court found that gravel was included under a deed conveying " 'all minerals including iron, coal, bauxite, sylica, and other metals and minerals, and all rights thereto, in, under AND UPON' (emphasis supplied) the property." It was evidently contemplated here that minerals referred to matter found on the surface of the land. Also, it was agreed by stipulation that " 'The sand and gravel upon in and under said land constituted all the mineral interest and that there was no other mineral in upon and under said land.' " The circumstances thus indicated an intention to include gravel within the meaning of the word "minerals." Where no evidence of such intention can be found, the definition of the word "minerals" does not ordinarily include gravel.

The leading Alabama case is **McCombs v. Stephenson,** 154 Ala. 109, 44 So. 867. The plaintiff had conveyed " 'all the coal, ores and other minerals and metals in, under, and upon' " the land in question. The Alabama Supreme Court held in the absence of qualifying words in the conveyance showing a contrary intent that the following definition would control:

> " 'By the term "minerals" are meant all the substances in the earth's crust which are sought for, and removed by man, for the substance in itself. It is not limited to metallic substances, but includes soft coal, clay, stone of various sorts, etc., and even petroleum and natural gas have been held to be minerals. "

It was then found that shale, a fissile rock formed by the consolidation of clay, mud, or silt, was a mineral, and was therefore included in the conveyance of mineral rights. However, this does not necessarily require the conclusion that gravel also is a mineral. Shale at least has a homegeneous structure in the same manner as granite, marble and limestone. There is nothing constant in the character of gravel by which to identify it as a mineral, except that it consists of broken fragments of rock mingled with finer materials such as soil and clay. **Lillington Stone Company v. Maxwell,** 203 N. C. 151, 165 S. E. 351. In this case, the court construed a statute allowing reimbursement of taxes paid in the purchase of gas used for mining purposes. It was held that mining for gravel did not come within the scope of the statute because gravel was not a mineral, but a jumbled mass of fragments of various minerals.

In view of the above decisions it is concluded that the word "mineral" as used in a grant or reservation does not include gravel in the absence of local usage or expressions of intent to the contrary.

Yours very truly,

SI GARRETT

Attorney General.

September 29, 1951

Hon. Emmett Perry

Circuit Solicitor

Tenth Judicial Circuit

Birmingham, Alabama

Solicitors — Costs and Fees — Jefferson County — Inferior Courts — Circuit Courts — Appeals.

1. Solicitors' fees in misdemeanor cases appealed to the Circuit Court of Jefferson County prior to August 1, 1951, the effective date of Act No. 327, General Acts 1951, approved August 1, 1951 (Ms.), which amends Title 11, Section 86, Code of Alabama 1940, should be taxed and collected in accordance with the schedule provided for in Act No. 165, General Acts 1947, page 57.

2. Solicitors' fees under the general law, changeable in Jefferson County misdemeanor cases appealed to the Circuit Court of Jefferson County, should be charged only in those cases prosecuted after August 1, 1951, the effective date of Act No. 327, supra.

3. Solicitors' fees are based upon services rendered by the solicitor in the prosecution of a case and the obtaining of a conviction.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of August 27, 1951, is as follows:

"I will appreciate it very much if you will examine Act No. 327, House Bill 393, approved August 1, 1951, and let me know when the Clerk of the Circuit Court should start charging the regular Solicitor's fees as provided in the last portion of the Act.

"There are now pending approximately two hundred cases on appeal from the inferior courts of this County to the Circuit Court, and I would like to know that on these cases that are now pending and were pending before August 1, 1951, whether or not in the event of a conviction, as provided under the Act, the Circuit Clerk should charge the regular Solicitor's fee as provided in the amended portion of the Act or should he charge on the pending cases before August 1, 1951, the Solicitor's fee charged in the inferior court where there is a conviction in the Circuit Court (Gen. Acts 1947, pp. 57-58).

"The Circuit Clerk has stated that he does not think that any fees should be charged except on cases appealed after August 1, 1951.

"An early reply will be appreciated for this opinion."

It is my opinion that the solicitor's fee in those cases which, on August 1, 1951, were pending in the Circuit Court of Jefferson County on appeal from

the inferior courts of said county should be taxed and collected according to Act No. 165, General Acts 1947, page 57, and not in accordance with Act No. 327, General Acts 1951, approved August 1, 1951 (Ms.), which amends Title 11, Section 86, Code of Alabama 1940.

It is further my opinion that Act No. 327, supra, providing for solicitors' fees to be taxed according to the general laws of the State, when cases are appealed from an inferior court to the circuit court, was not effective until August 1, 1951, and only in those cases which are tried in an inferior court subsequent to the effective date of Act No. 327, supra (August 1, 1951), can the general schedule of solicitors' fees be applied.

Prior to the passage and approval on August 1, 1951, of Act No. 327, supra, a special law, Act No. 165, supra, provided for a solicitor's fee to be taxed in cases commenced in the Jefferson County Court of Misdemeanors and appealed to the Circuit Court of Jefferson County. Act No. 165, supra, provides, in part, as follows:

> "There shall be taxed as part of the costs in each misdemeanor case prosecuted by such Deputy Circuit Solicitor the sum of Two Dollars and Fifty Cents ($2.50) as solicitor's fee, and in all felony cases prosecuted by said Deputy Circuit Solicitor there shall be taxed the sum of Five Dollars ($5.00) as solicitor's fee, which solicitor's fee shall be collected by the clerk of said court, or by the clerk of the circuit court when said cause is not finally determined in this court, and shall be paid by such clerks into the general fund of the county treasury."

Of course, this law regulating the costs and fees and charges of courts in Jefferson County was passed pursuant to Amendment II of the Constitution of Alabama 1901. This office has formerly held that when cases are appealed to the Circuit Court of Jefferson County from the inferior court or misdemeanor court the only solicitor's fee that can be charged is that provided for by the special law, in the amount of $2.50. Quarterly Report of Attorney General, Vol. 12, page 95. Under that opinion, a second solicitor's fee could not be charged in the circuit court, but merely the fee provided for by the special law applying to Jefferson County. As a matter of fact, the general law plainly provides that there shall be but one solicitor's fee in cases appealed to the circuit court. Title 11, Section 86, Code of Alabama 1940. Therefore, prior to August 1, 1951, in cases on appeal to the Circuit Court of Jefferson County, in misdemeanor cases, the solicitor's fee is that prescribed by the special law, i. e., $2.50, and no more.

On August 1, 1951, Title 11, Section 86, Code of Alabama 1940, a general law, was amended by Act No. 327, supra, to provide as follows:

> "Section 86. (3759) Solicitors' fees; how taxed and collected.—For every conviction for a misdemeanor in the county courts or inferior courts there shall be taxed and collected as a part of the costs and paid into the county treasury the same solicitor's fees provided for conviction in such cases in the circuit court; provided that in the event of an appeal to the circuit court no solicitor's fees shall be taxed or collected for the services of a solicitor in the circuit court, provided, however, that in cases appealed from county courts or inferior courts in counties of 400,000 population or more according to the last or any subsequent federal census, only one solicitor's fee shall be assessed and collected in the Circuit Court on conviction for a misdemeanor, such fee to be based on the amount provided for in the Circuit Court under the general laws of the state."

The proviso appearing at the end of said Section 86, as amended, was added by said amendment. This proviso has the effect of repealing that part of Act No. 165, supra, applying to Jefferson County, which provides for special solicitor's fees in misdemeanor cases, and in misdemeanor cases that are appealed to the circuit court. By the enactment of Act No. 327, supra, amending the general law, (Title 11, Section 86, Code of Alabama 1940), regular solicitor's fees are to be taxed and collected in misdemeanor cases in Jefferson County when cases are appealed to the circuit court and are followed by a viction. The question, therefore, concerns the applicability of the new or regular schedule of solicitor's fees provided to be charged and collected by the 1951 amendment to Section 86, supra, to those misdemeanor cases which were on appeal in the Circuit Court of Jefferson County on the effective date of the change of schedule of fees for solicitors.

We are here dealing with a fee which theoretically is payable to the solicitor for performing certain services in prosecuting misdemeanor cases. Of course, the fee no longer goes to the solicitor, but the fee is based upon the fact that a solicitor prosecutes a case in an inferior court and obtains a conviction. It is only under those circumstances that the solicitor is entitled to claim his fee. He must prosecute the case; he must obtain a conviction. As to those pending in the Circuit Court of Jefferson County on appeal on August 1, 1951, the solicitor had performed all of his services in connection with prosecuting the cases in the inferior court; he had obtained a conviction as a result of that prosecution. The only thing that remained to be done was for the solicitor's fee to be taxed as cost and collected from the defendant. It is well to point out that the solicitor's fee which is taxed by the circuit clerk in cases which were appealed from an inferior court is compensation for services performed in the inferior court as distinguished from the circuit court, no fee being allowed to the solicitor in such cases in the circuit court. Title 11, Section 86, Code of Alabama 1940. It is my opinion, therefore, that since all the services in respect to cases pending in the Jefferson County Circuit Court on appeal on August 1, 1951, were performed and conviction obtained in the inferior court while special law (Act No. 165, supra) was in effect, solicitors' fees in such cases should be taxed in accordance with said Act No. 165, supra.

In order to apply Title 11, Section 86, Code of Alabama 1940, as amended by Act No. 327, supra, the solicitor must perform the service of prosecuting and obtaining a conviction in the inferior court after August 1, 1951, because the amendment to Section 86, supra, providing for the regular schedule of solicitors' fees in Jefferson County was not effective until that date.

It could be argued that since Act No. 327, supra, amending Section 86, supra, repealed the provisions of Act No. 165, supra, which provides special solicitors' fees for misdemeanor cases in Jefferson County, that as to those cases pending on appeal on August 1, 1951,, there could be no authority vested in the clerk of the circuit court to tax the special solicitors' fees as provided by Act No. 165; and that since Act No. 327, supra, was not effective until that day, August 1, 1951, the new solicitor's fees for Jefferson County which are the regular solicitors' fees could not be taxed since the services of the solicitor were performed prior to the effective date of the act. It is my opinion that this argument could not prevail. In enacting Act No. 327, which amends Section 86, supra, the Legislature did not intend to repeal the authority of the clerk of the circuit court to tax and collect the special solicitor' fees provided for in Act No. 165, supra, in those cases which were presently pending on appeal in the Circuit Court of Jefferson County on August 1, 1951.

In conclusion, therefore, you are advised that, in the cases referred to in your inquiry, the circuit clerk should tax solicitors' fees in accordance with

Act No. 165, and begin to apply the new or regular schedule of fees under Act No. 327 only in those cases which are tried in the inferior court after August 1, 1951.

Yours very truly,

SI GARRETT

Attorney General.

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